United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-4044

B
P/5

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 76-4044

BOC INTERNATIONAL LIMITED, f/k/a The British Oxygen Company Limited, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, and BRITISH OXYGEN INVESTMENTS, LIMITED,

Petitioners,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

No. 76-4045

AIRCO, INC.,

Petitioner,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITIONS FOR REVIEW OF AN ORDER
OF THE FEDERAL TRADE COMMISSION

JOINT APPENDIX, VOLUME 5
PAGES A2219 TO A2862
TRANSCRIPT

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Attorneys for Petitioners
BOC International Limited, BOC Financial Corporation, BOC Holdings, Limited, and British Oxygen Investments, Limited
345 Park Avenue
New York, New York 10022

SHEARMAN & STERLING
Attorneys for Petitioner
Airco, INC.
53 Wall Street
New York, New York 10005

OFFICE OF THE GENERAL COUNSEL
Federal Trade Commission
Washington, D.C. 20580

FILED
JUL 26 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

United States Court of Appeals

For the Second Circuit

No. 76-4044

BOC International Limited, f/k/a The British Oxygen Company Limited, BOC Financial Corporation, BOC Holdings, Limited, and British Oxygen Investments, Limited,

Petitioners,

—against—

Federal Trade Commission,

Respondent.

No. 76-4045

Airco, Inc.,

Petitioner,

—against—

Federal Trade Commission,

Respondent.

ON PETITIONS FOR REVIEW OF AN ORDER
OF THE FEDERAL TRADE COMMISSION

JOINT APPENDIX

Summary of Contents

Volume 1	Papers Filed with the Commission	A1
Volume 2	Papers Filed with the Commission	A328
Volume 3	Transcript	A912
Volume 4	Transcript	A1563
Volume 5	Transcript	A2219
Volume 6	Transcript	A2863
Volume 7	Exhibits	A3585
Volume 8	Exhibits	A4181
Volume 9	Exhibits	A4790
Volume 10	In Camera Filings	A5330

TABLE OF CONTENTS

PAGE

Volume 1—Papers Filed with the Commission

Docket Entries A1

Complaint dated Feb. 26, 1974, filed Feb. 26, 1974 ..... A16

Answer of Respondent Airco, Inc. dated March 11, 1974, filed March 12, 1974 ..... A29

Motion of BOC Respondents for a Subpoena Duces Tecum dated March 19, 1974, filed March 19, 1974 ..... A38

Supplement to Motion of BOC Respondents for a Subpoena Duces Tecum dated March 20, 1974, filed March 21, 1974.. A59

Complaint Counsel's Opposition to BOC Respondents' Motion for Subpoena Duces Tecum dated March 25, 1974, filed March 25, 1974 ..... A66

Complaint Counsel's Initial Request for Admission of Facts dated March 26, 1974, filed March 26, 1974 ..... A80

Complaint Counsel's Supplemental Memorandum in Opposition to BOC Respondents' Motion for Subpoena Duces Tecum dated April 1, 1974, filed April 1, 1974..... A92

Airco's Response to Complaint Counsel's Initial Request for Admission of Facts dated April 8, 1974, filed April 10, 1974 ..... A110

BOC's Response to Complaint Counsel's Initial Request for Admission of Facts dated April 8, 1974, filed April 12, 1974 ..... A116

PAGE

Order by Administrative Law Judge Barnes Ruling on Motion of BOC Respondents for a Subpoena Duces Tecum dated April 23, 1974, filed April 23, 1974 ..... A132

Application for Interlocutory Appeal of Administrative Law Judge's Rule Filed by Counsel for Chemetron Corporation dated April 29, 1974, filed May 1, 1974 ..... A223

Complaint Counsel's Application for Review of Order Requiring Production of Documents from the Commission Files dated April 29, 1974, filed April 29, 1974 ..... A228

Application of Liquid Air Inc. for Review of Order Ruling on Motion of BOC Respondents for a Subpoena Duces Tecum dated April 30, 1974, filed April 30, 1974 ..... A239

Appeal by Air Products and Chemicals, Inc. from the Ruling of Administrative Law Judge and Respondents' Motion for Subpoena dated April 30, 1974, filed April 30, 1974 .. A249

Application for Review and Appeal by Union Carbide Corporation of Ruling by Administrative Law Judge Requiring Production of Confidential Union Carbide Documents dated April 30, 1974, filed April 30, 1974 ..... A261

Interlocutory Appeal of Big Three Industries, Inc. from Ruling of Administrative Law Judge dated April 30, 1974, filed May 1, 1974 ..... A272

BOC Respondents' Answer to Applications for Review dated May 6, 1974, filed May 6, 1974 ..... A278

BOC Respondents' Response to Complaint Counsel's Supplemental Request for Admission of Facts dated May 13, 1974, filed May 13, 1974 ..... A294

PAGE

Amended Answer of BOC Respondents dated May 23, 1974, filed May 24, 1974 ..... A309

Order by the Commission Granting Applications for Review dated May 29, 1974, filed May 29, 1974 ..... A315

Order by Administrative Law Judge Barnes Incorporating into the Record Results of Informal Conference of June 10, 1974 dated June 17, 1974, filed June 17, 1974 ..... A317

BOC Response to Complaint Counsel's Offer of Documents from Stanford dated July 23, 1974, filed July 25, 1974 .... A319

Order by Administrative Law Judge Barnes Receiving Exhibits in Evidence dated Aug. 1, 1974, filed Aug. 1, 1974.. A324

Order by Administrative Law Judge Barnes Ruling on Proposed Exhibits dated Aug. 2, 1974, filed Aug. 2, 1974 .... A326

Volume 2—Papers Filed with the Commission

BOC Proposed Findings of Fact, Conclusions of Law and Order dated Aug. 2, 1974, filed Aug. 7, 1974 ..... A328

Airco Proposed Findings of Fact, Conclusions of Law and Brief dated Aug. 2, 1974, filed Aug. 5, 1974 ..... A681

Initial Decision of Administrative Law Judge Barnes dated Oct. 18, 1974, filed Oct. 18, 1974 ..... A729

Commission's Findings as to the Facts, Conclusions, Order and Opinion dated Dec. 8, 1975, filed Dec. 8, 1975 ..... A852

PAGE

Volume 3—Transcript

Pre-Trial Proceedings

March 12, 1974 ..... A912
March 28, 1974 ..... A942
April 17, 1974 ..... A993
April 25, 1974 ..... A1040

Witnesses Called by Complaint Counsel:

Alec Flamm

Direct Examination A1122
Cross Examination A1176
Redirect Examination A1257
Recross Examination A1264

Dexter Farrington Baker

Direct Examination A1277
Cross Examination A1338

William E. Dempster

Direct Examination A1429
Cross Examination A1466
Redirect Examination A1490

S. Michael Loveman

Direct Examination A1494
Cross Examination A1513
Redirect Examination A1529
Recross Examination A1531

Volume 4—Transcript

Witnesses Called by Complaint Counsel (cont'd):

Albert Muller

Direct Examination A1566
Cross Examination A1617

PAGE

Howard Heckel

Direct Examination A1648
Cross Examination A1658
Redirect Examination A1668

John Hines

Direct Examination A1670
Cross Examination A1679
Redirect Examination A1681

C. D. L. Perkins

Direct Examination A1697
Cross Examination A1717

Robert S. Johnson

Direct Examination A1745
Cross Examination A1759

Solomon P. Kimerling

Direct Examination A1773
Cross Examination A1799
Redirect Examination A1812

Thomas E. Cunningham

Direct Examination A1836
Cross Examination A1849
Redirect Examination A1867

Proceedings, May 14, 1974 ..... A1890

PAGE

Peter Schreiber

Direct Examination A1962
Cross Examination A2014
Redirect Examination A2043

Bernard K. Kuehn

Direct Examination A2046
Cross Examination A2090
Redirect Examination A2106

Dr. John Hedley-Whyte

Direct Examination A2113
Cross Examination A2158
Redirect Examination A2210
A2213
Recross Examination A2211
A2213

Volume 5—Transcript

Witnesses Called by Complaint Counsel (cont'd):

Gary Porter

Direct Examination A2219
Cross Examination A2249
Redirect Examination A2265
Recross Examination A2271

Robin A. Scott

Direct Examination A2273
Cross Examination A2284

Proceedings, May 22, 1974 ..... A2305

PAGE

Proceedings, May 23, 1974 ..... A2338

Witnesses Called by BOC Respondents:

Leslie Edward Smith

Direct Examination A2393
Cross Examination A2555
Redirect Examination A2621
A2652
Recross Examination A2641

Richard V. Giordano

Direct Examination A2654
Cross Examination A2739
Redirect Examination A2779
Recross Examination A2788

Ray Dow

Direct Examination A2796
Cross Examination A2809
Redirect Examination A2817
A2821
Recross Examination A2818

Albert W. Karnath

Direct Examination A2824
Cross Examination A2844

Volume 6—Transcript

Witnesses Called by BOC Respondents (cont'd):

Andrew G. Kridl

Direct Examination A2873
Cross Examination A2980
Redirect Examination A3011
Recross Examination A3017

PAGE

Ray D. Cosgrove

Direct Examination A3042
Cross Examination A3180
Redirect Examination A3285
Recross Examination A3292

Peter Laister

Direct Examination A3300

Witness Called by Respondent Airco, Inc.:

George S. Dillon

Direct Examination A3355
Cross Examination A3376
Redirect Examination A3384

Witnesses Called by BOC Respondents (cont'd):

Peter Laister (cont'd)

Cross Examination A3385
Redirect Examination A3471

Rebuttal Witness Called by Complaint Counsel:

Dexter Farrington Baker (Rebuttal)

Direct Examination A3497
Cross Examination A3543
Redirect Examination A3572
A3573
Recross Examination A3573
A3574

PAGE

Volume 7—Exhibits

Exhibits Offered by Counsel Supporting the Complaint

CX 3	1966 Directors' Report and Accounts of British Oxygen Company Limited	A3585
CX 6	1968 Directors' Report and Accounts of British Oxygen Company Limited	A3614
CX 9	1970 Directors' Report and Accounts of British Oxygen Company Limited	A3640
CX 10	1971 Directors' Report and Accounts of British Oxygen Company Limited	A3674
CX 11	1972 Directors' Report and Accounts of British Oxygen Company Limited	A3712
CX 12	Sept. 29, 1967 Agreement between British Oxygen Company Limited and Air Reduction Company, Incorporated including attached exhibits A through F and Appendices A and B	A3750
CX 14	Oct. 1, 1968 Report on Visit of Sept. 24, 1968, to Gardner Cryogenics Corporation prepared by J. A. Perham and A. Muller	A3856
CX 15	August 11, 1968 BOC confidential report (PLS/JMD/50) on Gardner Cryogenics Corporation	A3861
CX 17	Dec. 30, 1968 letter from Albert Muller to Leslie Smith of BOC	A3895
CX 18	Jan. 10, 1969 Report of 1968 Consulting Activity by Albert Muller	A3896
CX 19	Jan. 24, 1969 letter with three attachments from Albert Muller to Dr. Nicol Gross of BOC	A3911

		PAGE
CX 23	March 28, 1969 letter from Albert Muller to L. E. Smith of BOC	A3916
CX 25	April 1, 1969 letter from Leslie Smith of BOC to Dr. A. Muller	A3919
CX 26	April 28, 1969 BOC report—Proposed Visit to USA by D. A. D. Morgan, with attached Oct. 6, 1969 BOC report—Visit to North America by D. A. D. Morgan	A3922
CX 27	April 29, 1969 letter to D. W. E. Stafferton of Cricklewood and J. A. Perham, of Canox	A3951
CX 29	May 14, 1969 report—Guidelines for BOC Group Activities, prepared by J. A. Perham and A. Muller	A3953
CX 31	June 25, 1969 letter from Albert Muller to L. E. Smith of BOC	A3958
CX 34	July 8, 1969 letter from J. A. Perham of Canox to Kevin J. Bradley of Dean Witter & Co.	A3960
CX 35	July 24, 1969 letter from Albert Muller to L. E. Smith of BOC with attached invoices	A3961
CX 36	Aug. 18, 1969 memorandum from L. E. Smith, BOC Group Managing Director, to Managing Directors, Chief Executives, J. A. Perham, and H. S. Rich	A3965
CX 37	Aug. 26, 1969 letter from J. A. Perham, president of Canox, to H. S. Rich of BOC	A3967
CX 38	Aug. 22, 1969 memorandum from H. S. Rich of BOC to J. A. Perham of Canox with attached report: BOC and the U.S.A.—A Paper for Discussion, dated August 20, 1969 with appendices A-E	A3970

		PAGE
CX 40	September 4, 1969 memorandum—BOC Group Activities in North America, prepared by J. A. Perham	A4002
CX 41	Sept. 23, 1969 letter from I. Greenfield of BOC to Dr. A. Muller	A4005
CX 42	Oct. 21, 1969 letter from Albert Muller to L. E. Smith of BOC	A4006
CX 43	Oct. 21, 1969 BOC Management Bulletin No. 59	A4008
CX 44	Nov. 6, 1969 BOC report—Industrial and Medical Gases in the U.S.A.—Statistics and Other Information, with attached appendices 1-7	A4011
CX 45	Dec. 1, 1969 letter from A. Muller to L. E. Smith of BOC	A4137
CX 46	Nov. 19, 1969 letter from A. Muller to R. C. Hesketh-Jones of BOC	A4139
CX 47	Dec. 3, 1969 letter from Leslie Smith of BOC to Dr. A. Muller	A4140
CX 48	Dec. 19, 1969 letter from Albert Muller to L. E. Smith of BOC with attached invoices	A4142
CX 49	July 22, 1971 Agreement between BOC and Airco with attached Exhibit A	A4145
CX 50	Oct. 9, 1974 BOC confidential report—The North American Market for BOC Medical Products, prepared by R. J. Williams	A4156

PAGE

Volume 8—Exhibits

CX 63 April 12, 1973 minutes prepared by P. Laister of BOC of meeting in St. Louis on April 6, 1973 re: proposed Emerson acquisition of Harris Calorific A4181

CX 70 June 1, 1973 BOC memorandum from J. A. Perham to P. Laister A4183

CX 72 June 22, 1973 BOC confidential report ("R" no. 157) A4186

CX 75 June 27, 1973 BOC confidential report ("R" no. 159) prepared by H. S. Rich A4200

CX 85 Undated extract from BOC Board Meeting Minutes from Company Secretary accompanying July 11, 1973 report, Project "Blindfold" from Group Strategy office, with appendix consisting of extracts from 1972 Airco Form 10-K and from Airco Report to Stockholders dated May 28, 1973 A4211

CX 88 July 19, 1973 BOC memorandum re: "Blindfold", to J. M. Williams and P. Laister from company secretary, C. A. B. Leslie and attached draft letter A4239

CX 99 Nov. 7, 1973 BOC memorandum to P. G. Bosonnet from Mrs. T. Fuller with attachment: July 30, 1973 transmittal slip to C. A. B. Leslie from P. G. Bosonnet, accompanying July 25, 1973 letter agreement executed by Richard V. Giordano of Airco and Peter Laister of BOC A4242

		PAGE
CX 101	Oct. 10, 1973 BOC memorandum from James N. Hiddleston to Mr. P. Laister and Mr. A. I. Ray	A4246
CX 102	Oct. 15, 1973 Organization Plans for Medishield	A4249
CX 107	Nov. 22, 1973 BOC memorandum from Ralph C. Hopton to P. Laister and A. I. Ray	A4257
CX 108	Dec. 10, 1973 Memorandum Agreement (Exhibit C) between The British Oxygen Company Ltd. and Airco, Inc.	A4258
CX 109	Jan. 30, 1974 letter from Peter F. Gold of Paul, Weiss, Rifkind, Wharton & Garrison, to Gordon Youngwood, Federal Trade Commission, with enclosures 1-5	A4261
CX 110	Jan. 24, 1974 letter from Peter F. Gold of Paul, Weiss, Rifkind, Wharton & Garrison, to Gordon Youngwood, Federal Trade Commission, with enclosure no. 1	A4274
CX 111	April 25, 1968 consultant agreement executed by C. A. B. Leslie, secretary of BOC, and Dr. Albert Muller	A4281
CX 112	March 20, 1970 letter from Albert Muller to L. E. Smith of BOC	A4285
CX 113	April 21, 1970 letter from J. H. Williams of BOC to Dr. A. Muller	A4287
CX 114	April 22, 1970 BOC memorandum from J. H. Williams to Dr. J. B. Gardner and Mr. H. S. Rich	A4288
CX 115	Aug. 17, 1971 letter from Mr. C. D. L. Perkins of Burdett Oxygen Company to J. M. Williams, managing director of BOC	A4289

		PAGE
CX 116	Sept. 6, 1971 letter from J. M. Williams of BOC to C. D. L. Perkins of Burdett Oxygen Company responding to letter of Aug. 17, 1971	A4291
CX 117	Nov. 16, 1971 letter from I. Temple Roberts of BOC to C. D. L. Perkins of Burdett Oxygen Company	A4292
CX 118	Feb. 1, 1974 letter from Peter F. Gold of Paul, Weiss, Rifkind, Wharton & Garrison to Gordon Youngwood, Federal Trade Commission	A4293
CX 121	February 20, 1970 letter to N. F. J. Reckitt of BOC from Albert Muller	A4294
CX 122	Jan. 20, 1970 letter to L. E. Smith of BOC from Albert Muller with attached invoices	A4296
CX 125	Dec. 10, 1973 Schedule 13D with attached Exhibits A-D and Exhibits 1-5, filed with Securities and Exchange Commission by BOC	A4299
CX 127	July 24, 1973 Checklist for Airco/BOC Discussions—July 25-27, 1973, prepared by D.M.M.	A4356
CX 130	Undated cover sheet for catalog—Fraser Sweatman Incorporated Products for Anesthesia, prepared by Fraser Sweatman, Inc.	A4362
CX 131	Undated catalog extract—Quantiflex R. F., prepared by Fraser Sweatman, Inc.	A4363
CX 132	Undated catalog extract—Fluotec Mark II Vaporizers, prepared by Fraser Sweatman, Inc.	A4369

		PAGE
CX 133	Undated catalog extract—The FS Pin Safety System for Volatile Agents, prepared by Fraser Sweatman, Inc.	A4392
CX 135	Undated catalog extract—AE Vaporizer, FS-713, prepared by Fraser Sweatman, Inc.	A4398
CX 139	Jan. 10, 1972 catalog extract—The Pentec Mark II for Penthrane, prepared by Fraser Sweatman, Inc.	A4400
CX 140	Undated catalog extract—Conductiflex Accessories, prepared by Fraser Sweatman, Inc.	A4406
CX 141	Jan. 10, 1972 catalog extract—Fluotec Mk II for Fluothane, prepared by Fraser Sweatman, Inc.	A4408
CX 146	May 1, 1972 Fraser Sweatman Hospital Anesthesia Products Price Sheet, prepared by Fraser Sweatman, Inc.	A4414
CX 147	Undated catalog—Fraser Sweatman Incorporated, Veterinary Anesthesia Equipment Catalog, prepared by Fraser Sweatman, Inc.	A4433
CX 148	Undated catalog extracts—Quantiflex RA Relative Analgesia Machine; Automatic Change-Over Manifold System; Manual Manifold System; Knight Guard bulletin KG-871; Other Products for Dentistry Available from Fraser Sweatman; Regulators, Hose Assemblies; Rubber Goods & Accessories; prepared by Fraser Sweatman, Inc.	A4445
CX 150	Feb. 29, 1972 product catalog prepared by Harris-Lake, Inc.	A4455

		PAGE
CX 170	Jan. 14, 1974 Airco Management Newsletter	A4513
CX 172	1967 Airco Annual Report	A4517
CX 175	1970 Airco Annual Report	A4556
CX 176	1971 Airco Annual Report	A4595
CX 177	1972 Airco Annual Report	A4631
CX 207	Oct. 2, 1968 letter from J. A. Perham to L. E. Smith of BOC transmitting Sept. 24, 1968 report on visit to Gardner Cryogenics Corporation, prepared by J. A. Perham and A. Muller	A4687
CX 208	Oct. 31, 1968 report—Canox Long-Range Plan, prepared by J. A. Perham	A4694
CX 209	May 16, 1969 letter from R. C. Hesketh-Jones of BOC to J. A. Perham of Canox ..	A4736
CX 210	June 9, 1969 memorandum of telephone conversation with Richard de La Chapelle and Kevin J. Bradley of Dean Witter & Co., prepared by J. A. Perham	A4737
CX 213	June 11, 1969 memorandum from J. A. Perham to R. C. Hesketh-Jones accompanying May 28, 1969 memorandum of meeting with representatives of Dean Witter & Co., prepared by R. W. Stevens	A4738
CX 214	June 20, 1969 letter from R. C. Hesketh-Jones of BOC to President, Canox	A4747
CX 216	July 7, 1969 letter from J. A. Perham, President, Canox, to R. C. Hesketh-Jones of BOC	A4748

		PAGE
CX 217	Nov. 12, 1969 restricted memorandum (PLS 69/34)—The USA—BOC Group Policies ..	A4749
CX 218	Dec. 1, 1969 restricted memorandum (PLS 69/36) — BOC and Chemetron — General Notes	A4757
CX 221	Dec. 18, 1969 letter from J. M. Williams to R. Johnson of Loeb, Rhoades & Co.	A4771
CX 222	Jan. 5, 1970 memorandum from H. S. Rich to J. M. Williams	A4772
CX 223	Jan. 12, 1970 memorandum—Visit to Chemetron, Jan. 8, 1970, prepared by J. M. Williams	A4773
CX 224	Jan. 16, 1970 letter from Robert S. Johnson of Loeb, Rhoades & Co. to John M. Williams of BOC	A4776
CX 225	Jan. 20, 1970 letter from L. E. Smith to J. A. Perham	A4777
CX 226	Jan. 22, 1970 letter from J. M. Williams to Robert S. Johnson of Loeb, Rhoades & Co.	A4779
CX 227	Jan. 28, 1970 letter from J. M. Williams to J. A. Perham of Canox	A4780
CX 228	Feb. 26, 1970 letter from Albert Muller to Leslie E. Smith of BOC	A4781
CX 229	Feb. 26, 1970 letter from Albert Muller to N. F. J. Reckitt of BOC	A4782
CX 230	April 21, 1970 letter from J. M. Williams to Dr. A. Muller	A4784

PAGE

CX 233 April 28, 1970 letter from P. J. Grant of Lazard Brothers & Co. to J. M. Williams of BOC accompanying report of Burdett Oxygen Co. of Cleveland A4785

CX 234 April 30, 1970 letter from J. M. Williams to P. J. Grant of Lazard Brothers & Co. A4788

CX 242 June 2, 1970 letter from P. J. Grant of Lazard Brothers & Co. to J. M. Williams of BOC A4789

Volume 9—Exhibits

CX 243 June 3, 1970 letter from J. M. Williams to P. J. Grant of Lazard Brothers & Co. A4790

CX 244 Sept. 23, 1970 typewritten note attached to Sept. 8, 1970 letter from J. A. Perham to L. E. Smith of BOC A4791

CX 245 Oct. 9, 1970 letter from J. A. Perham to S. Michael Loveman, President, Burdett Oxygen Co. of Cleveland A4793

CX 246 Nov. 11, 1969 memorandum — Notes on Meeting at Hammersmith House—3 Oct. 1969, prepared by R. C. Hesketh-Jones A4794

CX 247 June 16, 1969 letter from J. A. Perham to Kevin J. Bradley of Dean Witter & Co. ... A4795

CX 248 Oct. 21, 1969 letter from Albert Muller to J. Allan Perham of Canadian Oxygen Ltd. .. A4796

CX 249 October 13, 1970 letter from S. Michael Loveman of Burdett Oxygen Co., Cleveland to J. A. Perham, President, Canadian Oxygen Ltd. A4798

		PAGE
CX 250	Aug. 1, 1971 memorandum from J. M. W. Entitled "Norristown, Pa., C. D. L. Perkins, Executive Vice-President, 11 August, 1971"	A4799
CX 251	Aug. 26, 1971 memorandum from D. W. N. Pitts, GWH to J. M. Williams	A4802
CX 257	Oct. 18, 1971 letter from I. Temple Roberts to C. D. L. Perkins, Burdett Oxygen Co., Norristown	A4803
CX 258	Nov. 16, 1971 letter from I. Temple Roberts to C. D. L. Perkins, Burdett Oxygen Co., Norristown	A4804
CX 268	Jan. 9, 1973 BOC memorandum from James N. Hiddleston to A. I. Ray	A4805
CX 289	Oct. 17, 1973 letter from A. R. Dow to S. M. Loveman, Burdett Oxygen Company, Cleveland	A4806
CX 292	1973 Directors' Report and Accounts of British Oxygen Company, Ltd.	A4807
CX 293	March 14, 1974 letter from BOC to the Ordinary Shareholders with appendices I and II	A4845
CX 296	1972 Census of Manufactures, Industry Series, Industrial Gases SIC 2813	A4863
CX 298	Form MC-28B 1972 Census of Manufactures, Industrial Gases	A4869
CX 299	Instruction Manual for Current Industrial Reports for reporting on Form MA-28E.2 for Industrial Gases (Shipments and Productions) Annual Report	A4877

PAGE

CX 300 Bureau of Census, Current Industrial Report form MA-28E.2 ..... A4881

CX 312 U.S. Department of Commerce Current Industrial Report for Industrial Gases (SIC 2813), Series M28-C(72)-14 dated July 1973 A4889

CX 335 Liquid Air Corp. of North America S-1 .... A4900

CX 342 SRI Report Extract A4980

CX 343 1972 Census of Manufactures SIC 2869 Industrial Organic Chemicals A4986

CX 344 1972 Census of Manufactures SIC 2911 2922 Petroleum Refining A4998

CX Physical Exhibit A—Ohio Medical Products Catalog (excerpts) A5009

Exhibits Offered by BOC Respondents

BOC RX 2 Photograph of interior, Harris-Lake, Inc., 10910 Briggs Rd., Cleveland, Ohio A5037

BOC RX 3 Photograph of storage area, Harris-Lake, Inc., 10910 Briggs Rd., Cleveland, Ohio A5038

BOC RX 4 Photograph of exterior front, Harris-Lake, Inc., 10910 Briggs Rd., Cleveland, Ohio A5039

BOC RX 5 Photograph of exterior side, Harris-Lake, Inc., 10910 Briggs Rd., Cleveland, Ohio A5040

BOC RX 6 Photograph of manufacturing area, Harris-Lake, Inc., 10910 Briggs Rd., Cleveland, Ohio A5041

BOC RX 7 Photograph of manufacturing area, Harris-Lake, Inc., 10910 Briggs Rd., Cleveland, Ohio A5042

		PAGE
BOC RX 9	Photograph of the basement engineering office, Fraser Sweatman, Inc., 5490 Broadway, Lancaster, N. Y.	A5043
BOC RX 10	Photograph of the dental machine assembly, Fraser Sweatman, Inc., 5490 Broadway, Lancaster, N. Y.	A5044
BOC RX 11	Photograph of machine shop, Fraser Sweatman, Inc., 5490 Broadway, Lancaster, N. Y.	A5045
BOC RX 12	Photograph of dental machine assembly, Fraser Sweatman, Inc., 5490 Broadway, Lancaster, N. Y.	A5046
BOC RX 13	Photograph of engineering office, Fraser Sweatman, Inc., 5490 Broadway, Lancaster, N. Y.	A5047
BOC RX 14	Photograph of engineering office, Fraser Sweatman, Inc., 5490 Broadway, Lancaster, N. Y.	A5048
BOC RX 15	Photograph of stock room, Fraser Sweatman, Inc., 5490 Broadway, Lancaster, N. Y.	A5049
BOC RX 16	Photograph of machine shop, Fraser Sweatman, Inc., 5490 Broadway, Lancaster, N. Y.	A5050
BOC RX 17	Photograph of quality control room, Fraser Sweatman, Inc., 5490 Broadway, Lancaster, N. Y.	A5051
BOC RX 18	Photograph of quality control room, Fraser Sweatman, Inc., 5490 Broadway, Lancaster, N. Y.	A5052
BOC RX 19	Photograph of veterinary machine assembly, Fraser Sweatman, Inc., 5490 Broadway, Lancaster, N. Y.	A5053

		PAGE
BOC RX 20	Photograph of exterior, Fraser Sweatman, Inc., 5490 Broadway, Lancaster, N. Y.	A5054
BOC RX 31	Big Three Industries, Inc. 1973 Annual Report	A5055
BOC RX 35	Burdett Oxygen Co. of Cleveland, Inc.—Annual Report for the year ended February 28, 1973	A5075
BOC RX 53	Census Bureau, Current Industrial Reports —Industrial Gases 1972	A5094
BOC RX 56	American Iron and Steel Institute 1972 Report—Table re: Oxygen Consumption	A5106
BOC RX 57	May 16, 1968, R. C. Hesketh-Jones, "Group Objectives Part I: The Future Development of BOC as an International Concern"	A5109
BOC RX 60	Sep.. 12, 1969 "BOC and the USA—A Paper for Discussion"	A5117
BOC RX 61	Oct. 14, 1969 letter from J. A. Perham to S. M. Loveman	A5144
BOC RX 72	1967 Census of Manufactures, Vol. 1	A5145
BOC RX 181	BOC Chairman's Committee Nov. 27, 1969 Minutes re: "Study of USA Market".....	A5153
BOC RX 184	Jan. 4, 1974 Press Notice, Department of Trade and Industry	A5157
BOC RX 185	Jan. 5, 1974 letter from J. C. Mather to C. A. B. Leslie	A5158
BOC RX 187	Union Carbide—1972 Annual Report	A5159
BOC RX 188	Union Carbide—1973 Annual Report	A5184
BOC RX 189	Table of Shipments—Acetylene—1963-1972	A5207

		PAGE
BOC RX 190	Table of Unit Value—Shipments—Acetylene—1963-1972	A5208
BOC RX 191	Table of Shipments and Unit Value—Argon—1963-1972	A5209
BOC RX 192	Table of Shipments—Carbon Dioxide—1963-1972	A5210
BOC RX 193	Table of Unit Value—Shipments—Carbon Dioxide—1963-1972	A5211
BOC RX 194	Table of Shipments—Nitrogen—1963-1972	A5212
BOC RX 195	Table of Shipments and Unit Value—Hydrogen—1963-1972	A5213
BOC RX 196	Table of Unit Value—Shipments—Nitrogen—1963-1972	A5214
BOC RX 197	Table of Shipments and Unit Value—Nitrous Oxide—1963-1972	A5215
BOC RX 198	Table of Shipments—Oxygen—1963-1972	A5216
BOC RX 199	Table of Unit Value—Shipments—Oxygen—1963-1972	A5217
BOC RX 200	Document consulted by Dr. Hedley-Whyte during direct examination	A5218
BOC RX 206	June 1, 1970 Report on visit to Carpenter Technology by Perham and Muller	A5219
BOC RX 208	U.S. Dept. of Commerce, *U.S. Industrial Outlook*, 1974	A5222
BOC RX 222	Sept. 29, 1972, R. C. Hesketh-Jones, Consultation BOC-Overseas Companies	A5224
BOC RX 223	July 21, 1972, R. C. Hesketh-Jones, Overseas Company Boards	A5227

		PAGE
BOC RX 228	Program for the American Society of Anesthesiologists Annual Meeting, Oct.7-11, 1973	A5231
BOC RX 234	May 19, 1970 Letter from D. R. Harris to J. A. Perham	A5249
BOC RX 243	Percent Return on Total Invested Capital	A5250
BOC RX 244	Percent Return on Stockholders' Equity	A5251
BOC RX 246	Graphs of gas volume, quantity and unit price	A5252
BOC RX 260	Perry paper on oxygen and nitrogen (not in evidence)	A5265
BOC RX 261	American Iron & Steel Institute 1973 Report (not in evidence)	A5271

Exhibit Offered by Respondent Airco, Inc.

RAX 7	Airco Annual Report for 1973	A5274

Volume 10—In Camera Filings*

---

* The Table of Contents for Volume 10 appears only in that volume.

TOLER/1

AFTERNOON SESSION

2:00 p.m.

JUDGE BARNES: On the record.

MR. HOAGLAND: Complaint Counsel calls Gary Porter to the stand.

- - -

GARY PORTER was thereupon called as a witness for the Commission, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hoagland:

Q Mr. Porter, would you state your name and home address?

A Gary Porter, 45 Militia Hill Road, Warrington, Pennsylvania.

Q Are you appearing pursuant to a subpoena?

A Yes, I am, and I would like to state, at this time, that I am currently doing business with the Ohio Medical Products Company and the Fraser Sweatman, Inc, and I would like to state that I hope that this appearance under subpoena will not prejudice the ability to do business with those companies in the future.

MR. TOPKIS: At least for Fraser Sweatman, he can have our bible oath. We will be delighted to continue in close relationship with Porter.

MR. HAWKINS: I agree, on behalf of AIRCO.

By Mr. Hoagland:

Q Are you presently employed?

A Yes, I am.

Q What company are you employed by?

A Porter Instrument Company, Inc.

Q What is the address of that company?

A Township Line Road, Hatfield, Pennsylvania.

Q In what capacity are you employed by Porter Instrument Company, Inc.?

A As President.

Q How long have you held that position?

A I am slow to answer because we have changed some of the corporate structures and I have to trace the originating company -- about 3 years.

Q What are your duties and responsibilities as President of the company?

A Chief Executive Officer of the company.

Q Did you hold any previous positions with Porter Instrument Company?

A Yes, when Porter Instrument Company was a wholly owned subsidiary of Porter Industries, I was the Executive Vice-President.

Q What were your duties as Executive Vice President?

A It was my responsibility to operate the company in the absence of the President and to assist him during his presence.

Q How long have you been employed by Porter Instrument Company?

A Affiliated companies about April of 1963.

Q Would you trace your employment experience prior to working for Porter Instrument Company, Inc.?

A Yes. Between November 1961 and April of 1963, I was employed by Fraser Sweatman, Inc. Prior to that, I was employed for about 6 months by Brooks Instruments Company, and prior to that, for, I guess, about 3 years, by George K. Porter, Inc.

Q What was your position with Fraser Sweatman?

A General Manager.

Q Could you tell us what the business of Porter Instrument Company is?

A Porter Instrument Company is a manufacturer of medical and industrial instruments that are primarily related to the handling of and controlling of gases and liquids.

Q Are you familiar with the term, inhalation anesthetic equipment and accessories?

A Yes.

Q Would you please define that term for us?

A The equipment used for the administration of inhalation anesthetics.

Q Would dental analgesia equipment be included in your definition of inhalation anesthetic equipment and accessories?

A Yes.

Q Could you tell us exactly what dental analgesia equipment is?

A It is a mechanism to measure and regulate the flow of oxygen and nitrous oxide in the appropriate dosage to cause a state of euphoria in the patient.

Q How is the oxygen and nitrous oxide administered?

A It is primarily administered through an inhaler which covers the patient's nose, by the inhalation technique.

Q Would your definition of dental analgesia equipment include equipment that uses a needle to administer?

A You mean for i.v. anesthesia?

Q Yes.

A No.

MR. TOPKIS: By i.v., I take it the witness means intravenous?

THE WITNESS: Correct.

By Mr. Hoagland:

Q Mr. Porter, it has been brought to my attention, it may not be on the record as to whether or not you included dental analgesia equipment in the inhalation anesthetic equipment and accessories?

A Yes, I said I did.

Q How does the technology used to produce dental analgesia equipment compare with that of surgical anesthetic equipment?

A They are similar technologies.

MR. TOPKIS: Could I have the question read back, Your Honor?

(The pending question was read by the reporter).

JUDGE BARNES: Does the witness appreciate the difference between analgesia and anesthesia?

THE WITNESS: Yes.

MR. HOAGLAND: I will try and bring that out more fully as to what the difference is.

By Mr. Hoagland:

Q The previous question is, is the technology involved in the manufacturing of dental analgesia equipment the same as that used in the manufacture of inhalation anesthetic equipment and accessories?

A Yes.

MR. TOPKIS: I haven't heard the witness qualified as knowing about either subject. Unless he is, I will object to his answering. For all I know, he may be. I just don't know.

JUDGE BARNES: Off the record for a minute.

(Off the record discussion).

JUDGE BARNES: Back on the record.

By Mr. Hoagland:

Q Mr. Porter, what inhalation anesthetic equipment and accessories does your company manufacture?

A We manufacture the complete line of products that has been marketed by the Chemetron Corporation and its affiliates for the past 5 years under the brand name of NCG, or Coastal Dynamics.

Q What particular products would be included among those that you sell to Chemetron?

A The flow meters that measure oxygen and nitrous oxide, the breathing bags, the corrugated tubings, nasal inhalers, portable stands, high pressure and low pressure oxygen and nitrous oxide manifolds.

Q Mr. Porter, what products were manufactured by Fraser Swedtman while you were working for them?

MR. TOPKIS: These years were 1961 to 1968?

THE WITNESS: Correct.

MR. TOPKIS: I object. What is the relevancy of theperiod 1961 to 1968?

MR. HOAGLAND: Mr. Topkis was wondering about the background, whether Mr. Porter could testify as to certain products in the markets we are concerned with. I am merely trying to lay a foundation for that.

MR. TOPKIS: Fine.

THE WITNESS: There was a complete product line of inhalation anesthetic equipment manufactured and sold by Fraser Swedtman, Inc., including dental analgesia equipment.

By Mr. Hoagland:

Q Mr. Porter, now that the foundation has been laid as to your knowledge of the products in the market, I ask you again, is the technology involved in the manufacturing of dental analgesia equipment the same as that involved in the manufacture of inhalation anesthetic equipment?

A Yes, it is.

Q The products that you mentioned that you sell to Chemetron would fall within what category of the market that we have discussed?

MR. TOPKIS: I don't understand that. The witness has already told us what he sells to Chemetron. Now, what is he being asked?

JUDGE BARNES: I take it the product grouping these products fall into. Can you be more specific in that?

MR. TOPKIS: He was asked what inhalation anesthetic equipment he manufactures and he responded, we manufacture the complete line of products marketed by Chemetron, and he ticked them off. Flow Meters, etc. What is the purpose of going over that?

MR. HOAGLAND: Complaint Counsel is trying to establish, within the market of inhalation anesthetic equipment, there is an area that exists which consists of dental analgesia equipment. I am trying to find out whether the products Mr. Porter's company manufacture fall within that category.

JUDGE BARNES: Can you rephrase your question? I don't think your question is very good.

MR. HOAGLAND: I will certainly try.

By Mr. Hoagland:

Q Does your company manufacture dental anesthetic equipment?

A Yes.

Q What items does your company distribute that they do not manufacture in the inhalation anesthetic equipment market?

A Pressure regulators, various rubber items used as components to the inhalers. I think that is all. That is all that comes to mind.

Q Mr. Porter, I show you complaint counsel exhibit CX-316(a), (b) and (c), and ask you if you have ever seen this before?

MR. TOPKIS: Is this another one of those strangers we haven't seen before?

MR. HOAGLAND: I believe you received it this morning. You had received a copy of this previously, although it was not numbered specifically as we have it here.

MR. TOPKIS: Oh, yes. We have gotten this, but this is something we are going to stipulate on -- no? Okay.

THE WITNESS: Yes, I have seen this.

By Mr. Hoagland:

Q Can you identify that for us?

A Yes. It is the response to the first subpoena that I received.

Q Can you tell us how that paper came to be prepared?

A You mean the mechanism? How did my company develop these numbers?

Q Right.

A Sure. I picked the customers to whom we sell this product, those 2 product categories, and asked my accountant to tell me what the sales were for the years 1972 and 1973, which they did and which I included in that letter.

Q Did you check the final figures --

MR. TOPKIS: Objection. This is leading the witness, I believe.

JUDGE BARNES: Ask him what part he played in the development.

By Mr. Hoagland:

Q What part did you play, Mr. Porter, in the development of this exhibit, this paper?

A I issued the directions under which it was to be -- the data was to be accumulated. I reviewed it when it was received. I didn't check the actual ledger sheets myself because I found that the figures that were derived seemed to me to be reasonable for those 2 years.

Q Your Honor, at this time, I would like to offer Complaint Counsel Exhibit CX-318(a) through (c)into evidence

and request that it be treated in camera.

XXXXXX (The document referred to, CX-318(a) through (c) was marked for identification).

JUDGE BARNES: Any objections?

MR. TOPKIS: Yes. I would like to ask the witness a couple of questions on Voir Dire, if I may, before I decide what my position is.

JUDGE BARNES: Certainly.

XXXX VOIR DIRE EXAMINATION

By Mr. Topkis:

Q First, Mr. Porter, I notice, on sheet A of Exhibit 318, I think that is the one you have in front of you, dated April 23rd?

A Yes.

Q I notice a significant disparity between the figures for analgesia equipment and accessories between the years 1972 and 1973.

A Yes.

Q Can you explain that to me, please?

A Could you be more specific in your question?

Q I don't want to invade your confidence.

JUDGE BARNES: I take it one figure is much larger than the other?

MR. TOPKIS: Yes, Your Honor.

JUDGE BARNES: Why the difference in sales, Mr. Porter?

THE WITNESS: I certainly could explain it. I would prefer not to explain it in the open court or hearing room. There are good and understandable reasons for those differences considering the techniques I used for marketing the product.

MR. TOPKIS: It wasn't a matter of your stopping marketing any particular product?

THE WITNESS: No.

By Mr. Topkis:

Q Or changing the category of customers you call on?

A No.

Q Can you give us a general answer that would not invade your privacy? I can't tell you how strongly I mean that.

A Yes, I can. I told you the products were marketed through Chemetron and subsequently their affiliate, Coastal Dynamics. Coastal Dynamics was acquired by Chemetron in July of 1973.

Q And that made a difference in your sales figures?

A Yes.

Q Good enough. That is fine. Now, then, over on the second page, Mr. Porter, you offer us a certain breakdown and I see, down at the bottom -- does Complaint Counsel have another copy for His Honor?

JUDGE BARNES: That is all right. I will share this one with the witness.

By Mr. Topkis:

Q I see a figure on the top line there, Mr. Porter,

Analgesia Equipment and Accessories. That comes over from the preceding page?

A Yes.

Q Now, what is the breakdown below that? The first line is Nitrous Oxide Sedation Equipment. Is that within Analgesia Equipment and Accessories?

A They are all within that category.

Q Do they add up to the top line?

A I would assume so.

Q Have you checked the addition? I haven't.

A No, I haven't.

Q Would you indulge me for a moment while I try?

A Yes.

Q They don't add up.

A What is the difference?

Q I don't know. You mean, what is the explanation of the difference? I don't know.

A No, I wouldn't expect you to know.

Q How large is the difference?

A Yes. Is the figure less or greater than the figure in line I.A.?

Q It is greater.

A Did you include the bottom $46,962.14?

Q Total Female Products, you mean?

A Yes.

Q Yes.

A That is the Subtotal. That is the total of lines 5 and 6.

Q I see. Items 5 and 6 you have got parenthetically.

A The resale products were of particular interest to Mr. Hoagland and I broke those out at his request.

Q So the total Resale Products is the total of lines 5 and 6?

A Yes, and if you want the total, add lines 1 through 6.

Q I dont think that works out either.

A What is the difference? I can think of some reasons but what is the difference?

MR. KAPLAN: $30,000.

THE WITNESS: It is $30,000 lower?

MR. KAPLAN: Yes.

THE WITNESS: Probably spare parts.

MR. HOAGLAND: If Mr. Topkis is really interested in going deeply into this, I suggest we clear the court room and put the testimony in camera.

JUDGE BARNES: We haven't had any --

MR. THURMAN: I don't care, if the witness doesn't. We start mentioning figures and numbers. I just heard a figure come from that side of the room, now.

JUDGE BARNES: I don't believe --

MR. THURMAN: It is not so much it doesn't get on the record. It is going to operating people in the room. I

can hear from clear over here -- they shouldn't be hearing.

THE WITNESS: I think I could make an explanation without mentioning any figures. The products itemized were itemized at Mr. Hoagland's request. The mechanics for doing that were to study invoices which is not too difficult for us since we only have one customer to add up the total dollars in each of those product categories. The differences are easily explained in spare parts business and small invoices from miscellaneous items that might not even appear here.

By Mr. Topkis:

Q My figure expert tells me, for the second year, the total of items 1 through 6 is higher than the total under 1.A.

A I don't have any explanation for that.

Q With no explanation, we will still take it.

By Mr. Hawkins:

Q Mr. Porter, do you have a copy of the Complaint Counsel subpoena before you?

A I have it in the other room.

MR. TOPKIS: Here, I can give the witness one. This is the specifications anyway.

By Mr. Hawkins:

Q Now, you will notice, Mr. Porter, under paragraph 1 of the specifications, 1(j), Anesthesia Flowmeters, and paragraph 2(d) they have Inhalation Therapy Flow Meters. In your

response you indicate only anesthesia flowmeters. How do you distinguish between Anesthesia Flowmeters and Inhalation Therapy Flowmeters?

A I think there is a considerable difference. The Anesthesia Flowmeters that I referred to in paragraph 1(j) are the -- in my understanding and my response -- were the Flowmeters such as Porter Instrument Company Manufactures on an OEM basis and sells the Flowmeter component itself to companies such as Fraser Sweatman, Incorporated, Ohio Medical Products and other companies manufacturing anesthesia machines. Does that explain that category?

Q Then you have more than one customer? I thought you said before you had one customer which is Chemetron?

A No. I said I have one customer who is Chemetron for a complete line of dental analgesia equipment. My interpretation of paragraph 1(j) was [illegible] the Flowmeter component that is used by other manufacturers in the production of their equipment.

Q So you interpret this question on how other persons use this equipment?

A That is correct.

Q And you know how they use it?

A Yes.

And my interpretation of paragraph no. 2(d) is "A complete instrument that is used for the administration of

oxygen for inhalation therapy and Porter Instrument Company does not make such a device".

JUDGE BARNES: And you are reading from Commission Exhibit CX-316(b).

Mr. Porter, let me ask you -- what are the Resale Products shown on here -- how do they differ?

THE WITNESS: The Resale Products are products that we just buy and sell, we don't manufacture.

JUDGE BARNES: Is there any objection to the receipt of Commission Exhibit 318(a) through (c)?

MR. TOPKIS: Not from us, Your Honor.

MR. HAWKINS: No objection.

JUDGE BARNES: I will receive Commission Exhibit 318(a) through (c) in evidence in camera and incorporate this exhibit under the Protective Order.

(The document heretofore marked for identification as Commission Exhibit CX-318A through C, was received in evidence, in camera, under Protective Order.)

DIRECT EXAMINATION - Continued

By Mr. Hoagland:

Q Are you familiar with the other companies which manufacture inhalation anesthetic equipment and accessories? in the United States?

A Yes.

Q Would you name those companies that you are familiar

with in the United States that manufactured inhalation anesthetic equipment and accessories in 1972 and 1973?

A Ohio Medical Products, Fraser Sweatman, Inc., Harris Lake, North American Drager, Dupaco, McKesson, Porter Instrument Company, Forsgger. I think they are the major ones. There are probably several smaller ones that I have forgotten.

Q Based on your experience in the market, can you estimate the total U. S. net sales at the production level of inhalation anesthetic equipment and accessories in calendar year 1972 and calendar year 1973?

MR. TOPKIS: Objection, Your Honor.

MR. HOAGLAND: This only calls for a yes or no answer from the witness.

MR. TOPKIS: Then I object to the next question.

MR. HOAGLAND: We might not have to have a next question.

JUDGE BARNES: Can you answer the question?

THE WITNESS: Yes, I can.

By Mr. Hoagland:

Q What is the basis for your ability to estimate the total U. S. net sales?

A Just my experience and exposure to the market since 1961.

Q Would you please give us your estimate?

MR. TOPKIS: I object, Your Honor. This business of

piling worse and worse evidence on top of itself just ought to stop at some point. I really have the highest respect for Mr. Porter but he is a terrible source of proof as to this important fact. We can have real proof or very good-hearted speculation. Why should we choose the latter when we have the former, and pile the latter on the former, escapes me.

JUDGE BARNES: What is your answer to that, Mr. Hoagland?

MR. HOAGLAND: I think it has already been explained there are numerous companies in this market as well as the other markets that complaint counsel is proving in this case in order to obtain a universe that would require obtaining sales figures from every company regardless of how insignificant they may be in the market. Certainly somebody that has been in the field as long as Mr. Porter has, who has the familiarity with the companies that comprise the major companies, as he has termed them, that comprise the market, should be able to estimate and we all realize it is an estimate, what the total market should be. How else are we to arrive at a universe figure from whence we can determine concentration ratios of top 4 and top 8 companies.

MR. TOPKIS: The disadvantage of asking rhetorical questions is somebody stands up and -- the answer to that is preparing your case. To be more detailed about that, we have just had the witness's testimony that there are 2 - 4 - 8

major companies in this field and complaint counsel have talked to this witness weeks ago. They could very well then have elicited that information from him, sent letters to those 8 companies and asked the 8 companies what those sales are. As far as the other ones are concerned, they could have learned the identity of those and sent letters to those also. That is the way to prepare a case. I didn't come here to give lectures on the preparation of a case. I am beginning to feel I have never seen one prepared like this.

MR. HOAGLAND: I appreciate Mr. Topkin' advice. I assure him we have attempted to contact as many of the companies as we can that play a significant role in this market. You have issued 33 subpoenas requesting sales information. We are in the process of obtaining a stipulation as to the majority of these companies. Others are testifying as to their own personal sales. If Mr. Topkis is willing to stipulate the 33 companies we have contacted comprise a certain percentage of the market, I think we might be able to arrive at a universe figure.

MR. TOPKIS: I keep being offered the choice between stipulating and guessing. I refuse that choice. I don't think I should have to choose. I don't think the Commission should be subjected to evidence of this caliber.

JUDGE BARNES: I assume this is a Papercraft type question?

MR. TOPKIS: Papercraft arose in a situation where there was reason to rely. Here there is no reason to rely and Papercraft, we have got good evidence. We are here seeing Gresham's law stood on its end.

JUDGE BARNES: Well, the Commission has ruled in other cases, they would permit knowledgeable industry witnesses to approximate industry --

MR. TOPKIS: In certain circumstances.

JUDGE BARNES: The mere fact this evidence is being admitted in the record, does not mean that it will be the final evidence relied upon in any decision. If I reject it now, a year from now the Commission may say, you should have let it in, so --

MR. TOPKIS: Could I suggest to Your Honor, a course Your Honor might follow in that circumstance is to rule it out subject to an Offer of Proof, because nobody should rely on this. It is not worth contempt as compared with the good evidence that is available here. Of course, Courts make do with whatever evidence is available. We do our best to do justice. When evidence with deficiencies is all we can get, then we have to go ahead with evidence of deficiencies, and in such circumstances we call on honorable men and ask them to do their best. What we have here is a situation when we have all of the good evidence in the world and we are calling on an honorable man, who has only been involved in the peripheries

for 6 years, and are asking him to guess.

JUDGE BARNES: I am going to permit him to answer the question and receive the evidence in the record for what it is.

What is your estimate of the market?

MR. TOPKIS: Of the market, Your Honor?

JUDGE BARNES: Lets have the question read to him again. Can you state the question again?

By Mr. Hoagland:

Q Yes. Would you please give us your estimate of the total U. S. net sales at production level of inhalation anesthetic equipment and accessories in calendar year 1972, and again, in calendar year 1973?

MR. TOPKIS: That includes imports, I take it?

MR. HOAGLAND: Yes, I does.

THE WITNESS: I would say the market was essentially the same in the 2 years, maybe a slight increase in 1973 over 1972. I wouldn't know about that and my estimate of the market would be about $20,000,000 plus or minus whatever an estimate is worth, but I think about $20,000,000.

By Mr. Hoagland:

Q Thank you. Once again, Mr. Porter, based on your experiance in the business, would you name, in terms of dollar sales of manufactured items, the 4 largest companies that produced inhalation anesthetic equipment and accessories in the

United States in 1972?

A The 4 largest?

MR. TOPKIS: If Your Honor please, there is surely nothing in Papercraft about that.

THE WITNESS: Could you explain the term Papercraft to me?

MR. TOPKIS: I would say it is tissue paper. That is a flippancy, and I apologize to your Honor.

JUDGE BARNES: Papercraft is a previous Commission decision where they permitted knowledgeable industry people to approximate a market. How much is out there.

THE WITNESS: How does the term, papercraft apply?

JUDGE BARNES: The name of the case was Papercraft.

THE WITNESS: The 4 largest companies?

JUDGE BARNES: You have the same objection, I take it?

MR. TOPKIS: I do, Your Honor. I assume your ruling would be the same.

JUDGE BARNES: I will permit you to name the 4 companies, in your opinion, that are the largest in this inhalation anesthetic equipment business, the manufacturers.

MR. TOPKIS: And accessories.

JUDGE BARNES: And accessories.

THE WITNESS: Ohio Medical Products, Foregger, no.2,

Fraser Sweetman, Inc., no. 3, Harris Lake, no. 4.

By Mr. Hoagland:

Q Mr. Porter, what type of technological expertise, if any, is needed to enter into the manufacturing of inhalation anesthetic equipment and accessories in the United States?

MR. TOPKIS: Didn't we have this covered yesterday, Your Honor. I suggest this is cumulative.

JUDGE BARNES: I don't think we have reached a cumulative point yet. Can you answer the question, Mr. Porter?

THE WITNESS: Your question was what technical background?

By Mr. Hoagland:

Q Yes.

A Engineering capabilities -- I have particular knowledge of the engineering problems involved in the design and manufacture of the inhalation anesthetic equipment. I don't think you can be more specific than that.

JUDGE BARNES: Any patents involved?

THE WITNESS: Yes.

By Mr. Hoagland:

Q Does the marketing of inhalation anesthetic equipment and accessories in the United States require any technical knowledge or skill?

A Yes.

Q Could you explain, perhaps a bit further, the type of skill or technical expertise?

A In my opinion, the marketing problems are the more difficult to solve than the technical problems related to R&D or manufacturing. I think it requires more experience in the market to understand the market and the marketing techniques than it requires to produce the products.

Q In addition to the technological expertise and the marketing expertise, are there any other requirements for entering into the manufacturing and marketing of inhalation anesthetic equipment and accessories in the United States that you can think of?

A That is a broad question. It depends on your goals. For one thing, it takes capital.

Q Does your company market their own items?

A In the medical field?

Q In the medical field.

A No.

Q Has your company ever considered marketing their own items?

A Yes.

Q This is in the inhalation anesthetic equipment and accessories field.

MR. TOPKIS: What was the question before that?

THE WITNESS: The question was, do we market any

products in the medical field on a direct basis, and my answer was, no.

JUDGE BARNES: Have you ever considered direct marketing?

THE WITNESS: Yes.

MR. TOPKIS: That is in inhalation anesthesia?

THE WITNESS: Yes.

By Mr. Hoagland:

Q Why haven't you gone into marketing?

MR. TOPKIS: Objection.

JUDGE BARNES: There may be many reasons. Can you be more specific?

By Mr. Hoagland:

Q What were your conclusions upon contemplating marketing your own items in the inhalation anesthetic equipment and accessories market?

A It was in the best interest of Porter Instruments Company to allow a larger company, who had more resources and capital and sales people service people, to handle the marketing products than to try to do it ourselves.

Q In your opinion, is a sales force necessary in marketing inhalation anesthetic equipment and accessories in the United States?

A Yes.

Q Is a service force necessary in manufacturing inhalation

anesthetic equipment and accessories in the United States?

A The better service, the more sales you get. It is a service oriented business.

Q Mr. Porter, what type of trade advertising and promotion, if any, are used in the marketing of inhalation anesthetic equipment and accessories in the United States?

MR. TOPKIS: Does the witness do any such advertising?

JUDGE BARNES: The witness is not doing any such advertising. I think you need a background question.

MR. HOAGLAND: I will withdraw the question, Your Honor.

By Mr. Hoagland:

Q Earlier you stated, in your opinion, Ohio Medical was the largest producer of inhalation anesthetic equipment in the United States. To the best of your knowledge, how long has Ohio Medical been the largest producer of inhalation anesthetic equipment?

MR. TOPKIS: Same objection.

JUDGE BARNES: I don't think we need to go back any further on that.

MR. HOAGLAND: Fine. I will withdraw that question.

What do you consider to be the reason that Ohio Medical has been able to maintain its position as the no. 1 company in the U. S. in inhalation anesthetic equipment?

MR. TOPKIS: Objection, Your Honor.

JUDGE BARNES: I will sustain the objection.

MR. HOAGLAND: Could we have a minute, Your Honor? If we could have a 5 minute recess, I believe we might be able to shorten the direct examination of this witness.

JUDGE BARNES: Very well. We will take a 5 minute recess.

(At this point, a 5 minute recess was taken).

JUDGE BARNES: On the record.

By Mr. Hoagland:

Q Mr. Porter, earlier, you mentioned Fraser Sweatman, Inc., and Harris Lake, as companies that produce inhalation anesthetic equipment in the United States. Were you familiar with those companies prior to this acquisition by British Oxygen Company?

A Yes.

Q What was the basis for your familiarity?

JUDGE BARNES: He has testified he was General Manager of Fraser Sweatman for 7 years.

By Mr. Hoagland:

Q And with Harris Lake?

A Knowlddge in the industry as competitors and customers.

Q Have you noticed any change in the marketing activities of Fraser Sweatman, Inc.? and Harris Lake since the acquisition

By British Oxygen Company?

A Yes.

MR. TOPKIS: Wait -- wait -- wait. How about a foundation? I don't think either of those companies is currently engaged in selling to Mr. Porter and I don't think -- I don't see how we can have a meaningful foundation.

JUDGE BARNES: He says he has noticed some and I assume you are going to explore that, Mr. Hoagland?

MR. HOAGLAND: Yes. Mr. Porter has already testified he sells flowmeters to Fraser Sweatman and he does have an industry familiarity with those companies.

JUDGE BARNES: All right.

By Mr. Hoagland:

Q Mr. Porter, what changes have you noticed in the marketing activities of Fraser Sweatman and Harris Lake since the acquisition by British Oxygen?

A My sale of flowmeters has nothing to do with the answer to this question. It is unrelated. I assume you are asking about marketing practices of those 2 companies?

Q That is correct.

A We also have a business relationship as competitors, for instance, with Fraser Sweatman, Inc., since we are both significant factors in the dental analgesia equipment market. Since the acquisition of both companies --

MR. TOPKIS: Could we know the date the witness

has in mind, specifically?

JUDGE BARNES: Do you know the date of the acquisition, Mr. Porter?

MR. TOPKIS: There are 2 different ---

THE WITNESS: I suppose the Harris Lake acquisition would have been within the last 15 months. The Fraser Sweatman --- I am guessing --

MR. TOPKIS: It was last fall, wasn't it?

THE WITNESS: I don't know exactly. I am guessing.

MR. TOPKIS: How can the witness answer the question?

JUDGE BARNES: He is saying within the last 15 months.

MR. HOAGLAND: Mr. Porter can testify as to the marketing changes 2 years ago as opposed to marketing practices now, and I think that would certainly encompass the acquisition by British Oxygen.

JUDGE BARNES: I think we ought to know when the acquisition occurred before we talk about changes after the acquisition. I take it there might have been two, one with Fraser Sweatman and one with Harris Lake?

MR. HOAGLAND: Correct.

JUDGE BARNES: You might explore this with the witness.

By Mr. Hoagland:

Q Mr. Porter, since August 1973, have you noticed any change in the marketing activities of Fraser Sweatman and Harris Lake?

MR. TOPKIS: I move to strike on the ground it is irrelevant. I am sorry -- my colleague reminds me I am objecting, rather than moving to strike. August 1973 is a date without significance, either in the history of Harris Lake or Fraser Sweatman.

JUDGE BARNES: We will see. We have a date in mind and it may prove relevant or not. I will let him answer the question. What changes have you noticed since August of 1973?

THE WITNESS: I have noticed Fraser Sweatman, Incorporated sales force is now specializing in dental analgesia and veterinary anesthesia, where formerly it had a much broader product line, which is now being handled by Harris Lake. They have divided the responsibility of the sales forces.

MR. TOPKIS: Your Honor, this is mindreading and nonsense. The Harris Lake acquisition was closed November 29, 1973. The Fraser Sweatman acquisition was closed June of 1972. To connect those 2 events, what this witness perceives is utterly irrational.

JUDGE BARNES: He says he has now noticed this change in sales approach.

MR. TOPKIS: Which might be ascribeable to the convolutions. In any event, it has nothing to do with this

case.

JUDGE BARNES: Mr. Porter, I am not clear, in my mind -- perhaps the record is clear. The principal items you manufacture have to do with dental anesthesia?

THE WITNESS: Anesthesia or analgesia.

JUDGE BARNES: Equipment. You are primarily in the dental aspect?

THE WITNESS: Correct.

MR. HOAGLAND: We have no further questions, Your Honor.

CROSS EXAMINATION

By Mr. Topkis:

Q Going back to His Honor's immediate question to you -- your principal products are in the field of dental analgesia?

A Correct.

Q Pain killing or pain relieving or pain suppressing?

A Yes.

Q Those products are designed for use by the dentist in his office in treating patients. Is that right?

A Correct.

Q And they are nitrous oxides sedation equipment principally, are they not?

A Yes.

Q And you also make and sell flowmeters?

A Yes.

Q You have a figure on your Complaint Counsel Exhibit 318 -- you have figures for 1972 and 1973, for the sale of anesthesia flowmeters. Do you have a copy in front of you, sir?

A Yes.

Q Now, what would you say, Mr. Porter, if I suggested to you, according to the records of Fraser Sweatman, their purchases of flowmeters in those 2 years from you were within 90 percent of the totals you have there?

A I would say that is quite conceivable.

Q And you sold, also, flowmeters, also to Ohio?

A We are currently selling flowmeters to Ohio, yes.

Q In 1972 and 1973, were you?

A Not in 1972 and probably not very much in 1973, if any.

Q Are you sure these figures you have on complaint counsel Exhibit 318A for the sales of anesthesia flowmeters are accurate?

A Yes.

Q They couldn't include any significant quantity of sales to Ohio, could they?

A I wouldn't think so. I think we started to do business with Ohio during the calendar year 1973, and I think that the significant invoicing didn't take place until recently, but I don't have those figures in mind.

Q Before I go any further, may I have any Jencks material

on Mr. Porter?

JUDGE BARNES: There is no Jencks material here in my opinion, so I am turning it back over to Mr. Hoagland.

MR. TOPKIS: If YOur Honor please, it has been suggested to me, and I can't recall how -- I just have a note about it -- that Mr. Porter executed an affidavit in connection with this matter.

JUDGE BARNES: Did you execute an affidavit?

THE WITNESS: In connection with what matter?

JUDGE BARNES: Your testimony here today?

THE WITNESS: No.

JUDGE BARNES: Did you sign a statement of any kind?

THE WITNESS: The only thing I signed was the notarization that, to the best of my knowledge, the information submitted is correct. Is that the affidavit to which you refer?

MR. TOPKIS: I don't know. All I have is a note. You haven't signed any other affidavit in connection with the gases investigation or anything like that?

THE WITNESS: No, sir.

By Mr. Topkis:

Q Now, you testified that you make and sell flowmeters?

A Correct.

Q And you sell those flowmeters to purchasers other than people in the medical business, don't you?

A Correct.

Q You sell them to Chemical companies?

A Yes.

Q For controlling the flow of chemicals?

A Yes.

Q You sell them to companies in the Petrochemical Companies?

A Yes.

Q Who are similarly concerned with regulating the flow of gases or fluids?

A Correct.

Q The same kind of flowmeters are used in one application as another. Is that correct?

A Correct.

Q In the manufacture of flowmeters, Mr. Porter, would you please name for us your 5 largest competitors?

A Brooks Instrument Company, Fisher & Porter, Schutte & Koerting, C&E Instruments and Wilmad Glass Company.

Q Could you spell those last 3 for us, please?

A The last three were S-c-h-u-t-t-e and K-o-e-r-t-i-n-g, C&E Instrument Company and W-i-l-m-a-d Glass Company.

Q Do you sell equipment other than flowmeters to the chemical and petrochemical industries?

A Yes.

Q What kind of equipment?

A Pressure regulators and flow control devices.

Q Do you sell such instruments also to the medical i equipment industry?

A To a very small extent. We are just starting to.

Q You are trying?

A Yes.

Q And to your knowledge do these companies which you have named as being your principal competitors in this area also sell to the medical equipment industry?

A Yes.

Q Going back for a moment, if I may, to the nitrous oxide sedation equipment, that is equipment that a dentist uses when he has got the patient in the chair and wants to induce a level of analgesia?

A Correct.

Q Is any of the equipment you sell equipment where the patient himself can administer the dosage?

A No.

Q That is something that is passe in the industry?

A I hope so.

Q What kind of regulating device is there on that equipment, sir? How does the amount of nitrous oxide that the patient receives get regulated?

A It is regulated with a needle valve and the flow rate is indicated by a flowmeter.

Q And that tells the dentist the quantities of analgesic that the patient is receiving?

A Correct.

Q There is no vaporizer on your machine, is there?

A Not when it is used by the general dentist to produce a state of analgesia. There can be a vaporizer adapted for use, for instance, by the oral surgeon to administer anesthesia.

Q That is a dentist specializing in dental surgery or oral surgery?

A Right or by some hospitals in minor procedure operating rooms or in the obstetrical ward for inducing anesthesia.

Q Would it be --- where have you seen your equipment used in an obstetrical service?

A At the University Hospital in the University of Minnesota.

Q Anywhere else or is that the only one?

A The first one that comes to mind, probably, other places. I think at the Ayer Hospital in Buffalo; one of the hospitals in St. Louis -- I can't remember which one.

Q Any others?

A Those are the ones that come to mind, first.

Q Do any others come to mind?

A No.

Q Now, you have also seen your machine used in minor surgical procedures. What do you mean by minor surgical

procedures?

A Administering anesthesia in an operating room or Xray, in the xray department where they might be setting a bone under a fluoroscope, using general anesthesia.

Q Would it be accurate, without in the slightest degree downgrading the sophistication of your equipment, to say it is equipment in a relatively low level of sophistication anesthetically speaking?

A I don t know if I could make that differentiation. I think that anesthesia machine, to which you are referring, is made up of building blocks, and I don't think that the state of the technical art, in our building block, is any different than anyone elses.

Q Didn't you tell me the other day you had considered developing an anesthesia machine, but decided against it?

A Yes.

Q By that you meant an anesthesia machine by the type customers and extensively used in American hospitals today?

A In surgical operating rooms.

Q Yes, and the use of a nitrous oxide administration machine such as the type you have described the nitrous oxide sedation equipment for anesthesia purposes, is a relatively typical or unusual use of that machine, is it not?

A Correct.

JUDGE BARNES: Do you make the entire machine or

just some attachments to it, a flow valve --

THE WITNESS: It depends on the application. For dental analgesia, we make the entire unit. If the unit was to be used for administering general anesthesia, a vaporizer would have to be attached to it generally.

By Mr. Topkis:

Q Now, sir, you also make and sell speednometers?

A Sphygmomaneters.

Q You do sell them sir?

A Yes.

Q Do you make them?

A Yes.

Q And they are blood pressure measuring devices?

A Correct.

Q You sell them to the medical profession?

A Exclusively to Chemetron.

Q Which sells them exclusively as part of its dental equipment line?

A As part of their hospital equipment -- rarely to the dentist.

Q Dentists are not concerned with monitoring the blood pressure of their patients. There seems to be a trend toward more interest in that.

Do you also sell oxygen and nitrous oxide manifolds?

A Yes.

Q What is the purpose of such a manifold?

A To regulate the gas from the source cylinders and control it at a pressure that is useable in a pipeline and subsequently to supply the nitrous oxide sedation equipment.

Q And that equipment you sell to dentists?

A Correct.

Q Now, do you purchase anything from either Fraser Sweatman or Harris Lake?

A Yes, we purchase some conductive rubber items from Fraser Sweatman, Incorporated.

Q And nothing from Harris Lake?

A No.

Q What do you do with those conductive rubber items?

A Resell them.

Q To --

A Chemetron.

Q Are you making any modifications in them as you pass them along?

A Simply repackaging and relabeling.

Q Where do those items appear in your CX-318?

A CX-318B.

Q Where ever they appear.

A They probably make up the missing $30,000.

Q They are not, in any event, under items 1 to 6?

A No.

Q Now, you estimated the U. S. net sales of inhalation and anesthetic equipment as being $20,000,000 in 1972 and 1973, plus or minus whatever an estimate is. Is that right?

A That is right.

Q Would $10,000,000 either way be a fair figure for what an estimate is?

A I think that would be a broad tolerance.

Q Well, what I am really driving at --

A I think maybe a closer amount is five.

Q Somewhere between fifteen and twenty-five million would be your best estimate?

A Yes.

Q And you would prefer that to $20,000,000 actually?

A Yes.

Q Tell me this, sir. What do you estimate -- let me ask you first. Did you include in this figure, Dental Analgesia Equipment and Accessories?

A Yes.

Q Does Ohio manufacture and sell any dental analgesia equipment and accessories?

A Not that I know of.

Q Fraser Swastman does?

A Yes.

Q What do you estimate Fraser Swastmans 1973 sales of dental analgesia machines and accessories to be?

BEST COPY AVAILABLE

A In dollars or units?

Q In dollars.

MR. HOAGLAND: Your Honor, objection. If we want to find out what Fraser Sweatman's sales are, we need only to look.

MR. TOPKIS: That is not my objective.

JUDGE BARNES: You have been listening to Mr. Topkis too long.

MR. HOAGLAND: I am trying to learn from his expertise.

JUDGE BARNES: Your objection is out of line, I think, in view of the range of questions I permitted you, so I will permit him to answer this question.

THE WITNESS: I would say with the same percentage limits that I put on my estimate of the total market, between $750,000 and $1,250,000.

By Mr. Topkis:

Q All right, and how about for 1972?

A 30 percent less.

Q Now, lets talk about anesthesia machines, vaporizers and other accessories in the inhalation anesthesia field, excluding dental items, for the momert. What would you estimate Fraser Sweatman's 1973 sales of those items to be?

A Can you give me a minute?

Q Yes.

MR. HOAGLAND: Objection, Your Honor. I think there is a slight difference in type of questions that we were asking -- asking for an overall general estimate of the market -- and going into specifics of a particular company?

JUDGE BARNES: Did you ask him who the largest companies were and how he ranked them?

MR. HOAGLAND: Yes, I did.

JUDGE BARNES: I think this is proper exploratory questioning as to his basis for ranking the companies in size. It is proper cross examination.

By Mr. Topkis:

Q Ready, Mr. Porter?

A I think it would probably be about the same figure.

Q Somewhere between three-quarters of a million and a million and a quarter?

A Yes, sir.

Q You are including the veterinary?

A Yes.

Q How about Harris Lake, sir, 1973 sales of anesthesia machines?

JUDGE BARNES: Is this all of the equipment or machines?

By Mr. Topkis:

Q Just machines, for the moment.

A $250,000.

Q Plus or minus what?

A 25 percent.

Q And Harris Lake sells respirometers too, don't they?

A Yes.

Q They are an item of anesthesia equipment?

A Yes.

Q Not anesthesia machine, as the term is normally used.

A It is an accessory to --

Q If you had to estimate total sales of Harris Lake for machines and accessories, what would you estimate it to be for 1973?

A A million dollars.

Q Again, plus or minus 25 percent?

A Yes.

Q How about Air Products -- lets take 1973 and tell me please, sir, what your estimate is of Air Products sales of anesthesia machines and accessories?

A About $5,000,000.

Q Plus or minus 25 percent again?

A Yes.

Q And how about Ohio -- anesthesia machines and accessories 1973 sales -- your best estimate?

A $20,000,000.

Q According to my rough calculations, sir, you have said $20,000,000 plus 5 plus 1 and 1 -- that is 27?

A Okay.

Q That puts you over the high end of your range?

A Right.

Q Do you want to change your range or admit we are all fallible?

A Admit we are all fallible.

Q Good enough. I will go to something else.

A Maybe I am within my range since you can accumulate the tolerances.

Q All right. Fair enough, sir.

Mr. Porter, you mentioned, in talking, and I think in response to a question from His Honor, that in the field of inhalation anesthesia machines, or was it accessories, I am not sure -- correct me please -- there are some patents that are involved. Do you remember that testimony?

A Yes.

Q What do they relate to?

A The design of the equipment.

Q Of inhalation anesthesia equipment?

A Yes.

Q Gas machines, respirometers, vaporizers, what?

A I suppose all three.

Q Do you know -- are you familiar with these patents?

A I am familiar with patents of the vaporizer, design of certain components of anesthesia machines, patents on drugs --

Q Leaving the drugs aside, just talking about machines --

A I think there are patents on most of the mechanical machines that are marketed in the field.

The existence of these patents hasn't stopped companies from coming out with gas machines though.

Q When you were thinking of the possibility of designing your own anesthesia machine, the existence of the patent was not what deferred you?

A No. There is one area of patents that is of concern, that is in vaporizers and in considering an anesthesia machine, we felt we should not manufacture a vaporizer and patents with a consideration since there has just been, within the past 5 or 6 years, quite a round of discussions between 2 of the primary companies regarding patents of vaporizers, and I think it would be a prudent area for a small company to stay away from.

Q And buy your vaporizer from a patent holder?

A Correct.

Q You thought you could still go into the gas machine business?

A Yes.

Q Is Harris Lake or Fraser Sweatman a customer of yours?

A Fraser Sweatman is.

Q What do they buy from you?

A Flowmeter tubes.

46

Q What do they buy from you?

A Flowmeter tubes.

Q I am sorry. Are you a customer of theirs?

A Yes.

Q Of those rubber tubes you spoke of?

A Rubber tubings. I don't think it amounts to more than $5,000 a year. It is a very insignificant item.

Q That is all?

A Yes.

Q Your Honor, I am just about done with the witness, but I am a little foggy on the position of Complaint Counsel and would request, through Your Honor, we have some clarification. I would like to know whether Complaint Counsel claims nitrous oxide sedation equipment is in or out of the inhalation anesthesia field?

JUDGE BARNES: Can you answer that?

MR. HOAGLAND: Complaint counsel feels that it is in the market.

MR. TOPKIS: It is in?

MR. HOAGLAND: Yes.

MR. TOPKIS: Fine. Thank you very much. No further questions.

MR. HAWKINS: No questions, Your Honor.

MR. HOAGLAND: One moment, Your Honor.

MR. TOPKIS: Excuse me. One other question

occurred to me. Mr. Porter, am I right in believing, sir, McKesson makes dental analgesic equipment?

A Y THE WITNESS: You are correct.

By Mr. Topkis:

Q Specifically nitrous oxide sedation equipment?

A Correct.

Q And you do, of course. How about Hampton Research?

A They do.

Q And a division of Litton Industries?

A No, I think that Litton Industries doesn't manufacture that equipment. I think it is manufactured by the Foregger Company and sold under the Litton name.

Q There is a company called Starr Dental that also markets nitrous oxide?

A Yes, they own a company called Dentatron that manufactures the equipment.

Q Where are they located?

A Newport Beach, I think.

Q A company called Adec?

A Yes.

Q They, too, manufacture nitrous oxide sedation equipment?

A Correct.

Q That is all.

XXXX REDIRECT EXAMINATION

By Mr. Hoagland:

Q You mentioned 4 other companies that you are in competition with in respect to flowmeters for industrial purposes?

A Yes.

Q Do you know if they sell directly to hospitals the same flowmeters?

A They would only sell directly to hospitals for research or laboratory purposes, not for the general and common adminintration of any of the anesthetic gases or oxygen.

JUDGE BARNES: The flowmeters that you sell to a chemical company, are they of a different size?

THE WITNESS: They may or may not be. In some cases they are similar and in other cases they are of higher or lower capacity.

JUDGE BARNES: The principle would be the same?

THE WITNESS: The principle would be the same.

By Mr. Hoagland:

Q Mr. Porter, if you were to take your basic nitrous oxide sedation unit and add a vaporizer to it, what would you then have?

A You would have a device that would be able to be used to administer general anesthetic.

Q Would it be administered -- what would be the method of administration? How would the patient receive the anesthetic?

A You mean the mechanical method that it would be

administered?

Q Would it be injected into them or inhaled?

A It would be inhaled. The only thing I am involved in are inhalation products.

Q When you gave sales figure of Ohio of $20,000,000, did that figure include resale items that Ohio sells or would it just be items that were solely manufactured?

A I don't think that I can really express an opinion about that. I don't know how much of the product line Ohio manufactures or doesn't manufacture. I have no feeling for that, of the breakdown.

Q Your earlier testimony was you contemplated building or manufacturing your own inhalation anesthetic machine?

A Correct.

Q Could you tell us why you decided not to?

A Yes, from the --

MR. TOPKIS: I object, Your Honor. It could be any number of reasons -- fear of hobgobblins or anything.

MR. HOAGLAND: I would like to hear some of the reasons from the witness as opposed to Mr. Topkis.

MR. TOPKIS: What is the relevance of those reasons? I don't see the suggested relevance.

JUDGE BARNES: He went into testimony about patents and other matters, I believe. I will permit you to answer this question, Mr. Porter.

THE WITNESS: When I considered the capital investment in R&D and tooling and reasonable production quantity and considering the marketing avenues available, I felt the return on that investment did not justify going into that product line. It takes too long to penetrate the market in quantities to become economical to manufacture.

By Mr. Hoagland:

Q You also mentioned several other companies that manufacture nitrous oxide sedation equipment?

A Yes.

Q I believe Hampton Research --

A Dentatron, Adec.

Q Are you aware of where these companies market that product?

A Yes.

Q Could you tell us?

A All over the United States. Some are limited geographically, like, I guess Dentatron is. They are probably one of the smallest companies. They sell primarily in the west. Everyone else sells nationally.

Q Do you know approximately what percentage of the inhalation anesthetic equipment and accessories market these 3 companies make up?

A Which 3 companies?

Q Hampton Research, Dentatron and Adec?

MR. TOPKIS: Objection.

JUDGE BARNES: Of the product inhalation anesthetic equipment market?

MR. HOAGLAND: Correct.

Complaint counsel has said we are including nitrous oxide sedation equipment in our definition. The witness testified it was administered in the same way. We have had testimony as to the size of the market. Mr. Topkis has gone into sales of particular companies with respect to particular items. I certainly feel that Mr. Porter can continue in the same vein and give us his estimate of what percentage of the market these 3 companies account for.

MR. TOPKIS: If Your Honor please, I went into the sales of those other companies only for the purposes your Honor perceived, at the time, of testing the witness's estimate and left it at that. Now, to call on this witness to give his estimates of the sales of these competitors of his, I think just lets us off into the wild blue.

JUDGE BARNES: I think that is a little broad. I would permit a question as to what his estimate of the total market of the dental -- I am not familiar with the term now -- market, is.

THE WITNESS: Dental analgesia market/

JUDGE BARNES: Nitrous Oxide sedation market -- is

that what those other companies were in?

MR. HOAGLAND: Right.

MR. TOPKIS: Nitrous oxide sedation market.

JUDGE BARNES: Yes. What are the sales along that line?

By Mr. Hoagland:

Q Can you estimate total sales of nitrous oxide sedation units in the United States?

A $4,000,000 plus or minus a million.

MR. TOPKIS: I object, of course, Your Honor. The witness answered a little too fast.

JUDGE BARNES: Yes.

MR. HOAGLAND: Could you tell us what percentage of that market Hampton Research, Dentatron and Adec account for?

MR. TOPKIS: Continuing objection, if I may, Your Honor.

JUDGE BARNES: You may answer that, if you know, Mr. Porter.

THE WITNESS: 20 percent.

MR. HOAGLAND: Is that a combined figure?

THE WITNESS: Yes.

MR. HOAGLAND: Fine. No further questions, Your Honor.

JUDGE BARNES: Any recross?

MR TOPKIS: Just a second, Your Honor.

A 2271

RECROSS EXAMINATION

MR. TOPKIS: Lets fill it in, Your Honor. I will do this without waiving my objection to this line of inquiry. Since it has been opened, we may as well have the whole story. I take it I may do so without waiving my prior objection?

JUDGE BARNES: Yes.

By Mr. Topkis:

Q Could we have your estimate of the percentage accounted for by McKesson?

MR. HOAGLAND: Of what, Your Honor?

By Mr. Topkis:

Q Whatever you were asking about, counsel?

A I think I understand.

Q I think you do.

A 30 percent.

Q And Starr Dental?

A That was included in the previous figure.

Q I beg your pardon. I thought the previous figure included Hampton, Adec and Dentatron?

A Dentatron is Starr.

Q I beg your pardon. And again, your estimate of the share of Fraser Sweatman would be --

A 20 to 25 percent. I guess I would have to say 20 percent to be consistent with my previous answers.

Q I don't mind your being inconsistent.

A Yes, I know.

Q All right. That is 20, 30, 50, 70. Who has the remaining 30 percent, or who have, what companies?

A Chemetron. Have I missed any because I don't think Chemetron shares 30?

I say, Chemetron.

Q Thank you, sir.

MR. ZHUMAN: I would like to state something for the record before we go further. There is certainly a difference between his asking what the overall industry sales are, because these companies figure their own market share by this and going down to little infinitesimal segments of that market. The only reason that was asked on redirect what these companies amounted to, is something brought up by Mr. Topkis and the only thing we want to show is the large share of the market or small share -- they were insignificant. I am not sure that a company knows exactly the percentages -- I am sure these are pretty reliable, the witness's estimates, but I am not sure what they consider. They know who the 1, 2, 3 and 4 companies are without knowing exactly what their sales are, so he named the top 4 firms and named the overall market because they figure their own market share. If we are going into these, I think we might be violating the in camera at this point, if it is pretty close. There is certainly no

need to put the actual sales figures in camera if we are going to put an estimate, which is probably a pretty close estimate on the record.

JUDGE BARNES: This is information Mr. Porter had before he came in the hearing room, what his competitors are doing. I don't see anything confidential about that and I don't see any objection to it.

If you are finished with the witness, we will excuse Mr. Porter.

Thank you, Mr. Porter.

(witness excused).

JUDGE BARNES: Do you have another witness for today?

MR. HOAGLAND: Yes, Your Honor.

Complaint Counsel calls Robin Scott.

XXX ROBIN A. SCOTT was thereupon called as a witness for the Commission, and after being first duly sworn, was examined and testified as follows:

XXX DIRECT EXAMINATION

MR. NICKEL: Your Honor, Mr. Scott is represented by counsel who wishes to make an appearance, at this time.

MR. SAYLOR: Appearing is Robert Saylor of Covington & Burlington.

By Mr. Nickel:

Q Would you state your name and home address for the

record, please?

A Robin A. Scott, 2845 Liberty Avenue, Allentown, Pennsylvania.

Q Are you employed?

A Yes, by Air Products and Chemicals, Inc.

Q In what capacity are you employed by Air Products and Chemicals, Inc.?

A General Manager of the Medical Products Division.

Q How long have you held that position?

A 6 months.

Q What are your duties and responsibilities as General Manager of the Medical Products Division?

A I supervise the production and sales activities of all products Air Products manufactures or sells to the medical industry. This includes gases, anesthesia equipment, respiratory therapy equipment, pipeline equipment and suction equipment.

MR. TOPKIS: Could I request, Your Honor, Mr. Scott, please keep your voice up. It is difficult to hear with this air conditioning unit running.

THE WITNESS: Okay.

By Mr. Nickel:

Q Have you held any previous positions with Air Products and Chemicals?

A Yes. I have had 5 previous positions, all in the Industrial

Gas Division.

Q How long have you been employed by Air Products and Chemicals?

A 10 years.

Q What was your employment experience prior to being employed by Air Products and Chemicals?

A I was with Union Carbide of Canada, Limited.

Q How long were you with Union Carbide?

A 6 years.

Q You stated that the Medical Products Division of Air Products and Chemicals sells anesthesia equipment and respiratory therapy equipment?

A That is correct.

Q Does the Medical Products Division manufacture as well as distribute anesthesia equipment?

A Yes.

Q Does the anesthesia equipment include inhalation anesthesia equipment?

A Yes.

Q How long has Air Products and Chemicals been engaged in the manufacturing and distribution of inhalation anesthesia equipment?

A Between 3 and 4 years.

Q How did Air Products and Chemicals enter the inhalation anesthesia equipment market?

A We were a reseller of inhalation anesthesia equipment for the past 14 years; between 3 and 4 years ago, we acquired the Foregger Company and then became a manufacturer.

Q Does Air Products and Chemicals both manufacture and distribute respiratory therapy equipments?

A We manufacture and supply our equipment.

Q Equipment and accessories?

A For respiratory therapy.

Q How long has Air Products and Chemicals been engaged in the manufacture and distribution of respiratory equipment and accessories?

A 3 years.

Q Mr. Scott, I show you Commission Exhibit 317 for identification.

(The document referred to was marked for identification as Commission Exhibit CX-317 A through E .

By Mr. Nickel:

Q Mr. Scott, I show you Commission Exhibit 317, for identification. Do you recognize that document?

A Yes, I submitted it.

Q Would you identify it, please?

A I submitted this in response to a subpoena.

Q Was that subpoena from the Federal Trade Commission?

A Yes, it was.

Q Was it addressed to you, Mr. Scott?

A Yes.

Q What steps did you take to comply with that subpoena?

A The subpoena was to provide sales records for the years 1972 and 1973. To do this we researched our records which consist of computor runs on all of our commodity items. We have about 5,000 commodity items and we selected, from those, the ones requested.

Q Was this document prepared under your supervision?

A Yes, it was.

Q Is this document accurate, to the best of your knowledge?

A Yes, it is, with one exception. We double counted one item which I advised you of this morning.

Q Your Honor, Mr. Scott just discovered with respect to one particular item on that list, there is double counting and if it is permissible, he is willing to submit a letter which will correct the figures with respect to that particular item, as soon as possible, possibly even tomorrow, and we could attach that letter to this exhibit, if that is satisfactory.

JUDGE BARNES: Do you have the figures that you are able to make a correction here today, Mr. Scott?

THE WITNESS: I have the figures but I don't know exactly where to place them in here. It is in two commodities so I have to change two numbers. I am not sure how to distribute it.

By Mr. Nickel:

Q With the exception of that one particular item, Mr. Scott, is that document accurate to the best of your knowledge?

A Yes, it is.

JUDGE BARNES: Is this one item small in dollars?

THE WITNESS: Yes, it is.

MR. TOPKIS: I have no objection to the witness submitting a letter, Your Honor, and we can add it then. I am sure it will be right.

JUDGE BARNES: Thank you.

MR. NICKEL: Complaint counsel offers into evidence this document which has been marked Commission Exhibit 317, for identification.

JUDGE BARNES: Commission Exhibit 317A through E?

MR. NICKEL: Yes.

JUDGE BARNES: Any objections?

MR. TOPKIS: I don't think so, Your Honor. I have some question to put to the witness about it but they don't go to its competence.

MR. NICKEL: Mr. Scott, of Air Products and Chemicals considers the data set forth to be very confidential. For that reason, I request it be given in camera treatment.

JUDGE BARNES: I will receive 317A through E in evidence, and this document given in camera treatment and

61

it will be subject to Protective Order.

(The document heretofore marked CX-317A through E, for identifcation, was received in evidence, in camera).

By Mr. Nickel:

Q In general, Mr. Porter, to whom does your company market inhalation anesthetic equipment and accessories?

A This equipment is marketed to hospitals and more specifically to anesthesia departments. It is marketed both directly by our own employees and through dealers.

Q What areas of the country does your company manufacture inhalation anesthetic equipment and accessories?

A This equipment is manufactured on Long Island.

Q What areas of the country does your company market inhalation equipment and accessories?

A In almost all areas of the country.

Q What other companies manufacture inhalation anesthetic equipment and accessories in the United States?

A Ohio Medical, Harris Lake, Dupaco, North American Drager, National Catheter, Rusch, Portex, Fraser Sweatman, Welsh Allen.

Q Does Anesthesia Associates manufacture and market inhalation equipment?

A Yes, they are a small one.

Q Would you also include Dard Parker in that group?

A Yes, I would.

Q Would you also include Narco Scientific and Bird in that group?

A Yes, I would.

Q Mr. Scott, do you know what products Welsh Allyn manufactures?

A Laryngoscopes.

Q Any other items with respect to inhalation anesthetic equipment?

A None that I am aware of.

Q Do you know if the Laryngoscopes they manufacture would be classified as direct Laryngoscopes?

MR. TOPKIS: What does that mean?

THE WITNESS: I don't know.

JUDGE BARNES: The witness does not know so I guess that takes care of the question.

By Mr. Nickel:

Q Mr. Scott, does Air Products and Chemicals determine the size of the total U. S. market of inhalation anesthetic equipment and accessories?

MR. TOPKIS: That is an extraordinary question. Do they determine the size? By what?

JUDGE BARNES: Rephrase your question.

By Mr. Nickel:

Q Does Air Products and Chemicals conduct studies of the size of the inhalation anesthetic equipment and accessories

market in the United States?

A Yes, we have estimates on the total size of the market, based on some survey material, financial reports of people in the business, trade sources, prospective employees, that sort of thing, yes.

Q Would you please estimate the total U. S. sales at the manufacturing level of inhalation anesthetic equipment and accessories in the calendar year 1973?

MR. TOPKIS: Objection, Your Honor. The witness has just said they are estimates prepared by Air Products. Those estimates, I imagine, would be more reliable than his personal estimate which can be based on his 16 months experience on the job.

JUDGE BARNES: Mr. Scott, are you giving your personal estimate or the estimate that has been arrived at within the company?

THE WITNESS: Estimate arrived at within the company.

JUDGE BARNES: I will permit you to give the estimate, if you know.

MR. TOPKIS: Could I request production of the estimates?

JUDGE BARNES: Is this in the form of a written study or survey, Mr. Scott?

THE WITNESS: I don't have it with me today.

64

MR. NICKEL: I think the witness knows what the figure is. We are not trying to prove the terms of the particular piece of paper it is written down on.

MR. TOPKIS: I can't very well cross examine the piece of paper, Your Honor, without at least having it here.

By Mr. Nickel:

Q Mr. Scott, for what purpose do you use the estimates used by your company as to the market size of the inhalation anesthetic equipment and accessories market ?

A We use it for a lot of things -- determining our own market share to see where we are progressing and falling behind, see if we should change our marketing strategies, that sort of thing.

Q Once again, Mr. Scott, what was Air Products and Chemical's estimate of the total U. S. sales at the manufacturing level of inhalation anesthetic equipment and accessories in calendar year 1973?

MR. TOPKIS: Objection, Your Honor -- same ground.

JUDGE BARNES: I am going to permit him to answer the question.

MR. TOPKIS: I request the witness then be directed to return with the documents?

JUDGE BARNES: I am not going to direct him to do that but I will wait and see how you proceed with cross examination.

THE WITNESS: Our estimate of the market is

$30,000,000 and I would say that is within error of 15 percent.

MR. NICKEL: What amount of that figure is accounted for by the sales of Air Products and Chemicals and the companies you have named?

MR. TOPKIS: Continuing objection, Your Honor.

JUDGE BARNES: All right.

THE WITNESS: Of the companies that have been named, 90 percent.

By Mr. Nickel:

Q Mr. Scott, are you familiar with the legislation relating to the introduction of new medical devices that has been passed by the U. S. Senate and is currently pending before the House of Representatives?

MR. TOPKIS: To make it short, I object to this line of questioning and solicit Your Honor to repeat your ruling of yesterday and safe us time.

JUDGE BARNES: If I can recall my ruling yesterday.

MR. TOPKIS: You kept it out. Otherwise, I don't think I would be on my feet.

MR. NICKEL: My memory may be faulty but I believe you allowed the witness to state what present effect, if any, that legislation had upon the company or upon the market.

MR. TOPKIS: Your Honor, suppose -- this just --

I object.

JUDGE BARNES: Well, the question is, are you familiar with the legislation, Mr. Scott?

THE WITNESS: I am aware of it.

JUDGE BARNES: And has this proposed legislation had any present effect on your company operations?

MR. TOPKIS: Objection.

JUDGE BARNES: You may answer.

THE WITNESS: It has had no effect on the operations but we have made steps to provide for it, taken steps to provide for it. We have established additional committees to look after product integrity and the introduction of new products and have hired an outside consultant to guide us.

MR. NICKEL: Your Honor, we have no further questions.

CROSS EXAMINATION

By Mr. Topkis:

Q Mr. Scott, just because I always admire people who manage to sell their services in extraordinary areas, would you please name, for the record, the consultant who you hired in connection with this proposed legislation?

A The name of the man is Jacobs. He is a professor at the University of Newark College of Engineering. He is a specialist in Product Integrity.

Q Thank you. You mentioned a number of companies in

67

the medical field. Before I get to them, though, I have a reliable right hand who reminds me to ask for Jencks material. That is not directed to you, Mr. Scott.

MR. NICKEL: Your Honor, we have no verbatim statements or substantial verbatim statements. I will hand you the notes we do have.

JUDGE BARNES: All right. This is not Jencks material and I will return it to Complaint Counsel.

By Mr. Topkis:

Q Before you took the witness chair, sir, you read some documents. Isn't that right?

A Before I got here?

Q Yes, sir.

MR. NICKEL: Objection, Your Honor.

JUDGE BARNES: I think we should be more specific.

By Mr. Topkis:

Q While you were sitting in the witness room across the hall, you were busy reading?

A Yes.

Q You were reading documents connected with this case, weren't you, sir?

A Yes, some of the time, yes.

Q And specifically, you read part of the transcript of this case, didn't you?

A I was reading a transcript of another employee of our

company, yes.

Q In this case?

A Yes.

Q And you read additional material, didn't you, Mr. Scott?

A Yes.

Q What other material did you read?

A I was going through the --

MR. NICKEL: With respect to this case?

MR. TOPKIS: I don't care about the Washington Post.

JUDGE BARNES: Limited to this proceeding.

THE WITNESS: I read the subpoena. The rest of it is not specific to this case.

By Mr. Topkis:

Q You were sitting in that witness room across the hall for an hour and a half, were you not?

A Yes.

Q All of that time you were reading?

A Most of it.

Q And the materials that you were reading are contained in that grey briefcase on the floor?

A That is correct.

Q And one of them is the transcript on the floor next to the briefcase?

A That is right.

Q What is in the briefcase besides that, that has any connection with this case?

MR. NICKEL: I object, Your Honor.

JUDGE BARNES: I think you should just ask him what he read that had to do with this case.

MR. TOPKIS: That is all I am asking him.

THE WITNESS: As a matter of fact, what I was reading is our plan for the next 5 years and I was also reading about 2 inches of mail.

By Mr. Topkis:

Q Those are the things I am not asking you about. I am asking you about things that had to do with this case. I am not concerned with your mail or your plans.

A In our plan there is some market data.

Q What kind of market data -- estimates of other companies market shares -- estimates of the total market?

A Estimates of the total market. Right.

Q And you used that estimate in formulating the judgment that you expressed in your testimony a little while ago?

MR. THURMAN: If this line of questioning is allowed to continue, we are going to ask that everything each gentleman who sat in this room and read, from the time this case started, or before it started, until the time they take the stand, be produced. It is immaterial. I don't know

where he gets this line of questioning. Certainly, they hear this. This is why we have asked they be sequestered. If they are going that far, I don't think it is improper for him to read stuff for this case. Every gentleman in this room is going to be told to bring everything he read from the time this case started.

JUDGE BARNES: Noone said what he has read is improper.

MR. THURMAN: I want Mr. Topkis to be on notice to have everything with them that they have read from the time this case started.

MR. TOPKIS: They are on notice.

Now, may I have an answer to my question?

THE WITNESS: What is the question again?

MR. TOPKIS: Would you read it back -- or I will state it again.

You spoke of market data and I asked you whether you used that data in formulating the opinion you expressed to his Honor a while ago.

THE WITNESS: On the size of the market -- yes, I did.

MR. TOPKIS: May I see the document?

MR. NICKEL: I object.

JUDGE BARNES: I object to this, too. Mr. Scott has not brought it into the room or had it at the counsel

table and as far as I know, I know of no rule that permits you to see it. He doesn't have it with him.

MR. TOPKIS: The witness has just testified he used a certain document in formulating a judgment which he expressed to this court, and I think that entitles me to see the document. Perhaps he misread it. Perhaps he turned the figures around backwards. I can't cross examine that opinion. I have enough difficulty cross examining the opinion because it is an opinion. When he tells me he based it in part upon a particular document and has the document and consulted with it in the last hour, I can't imagine anything more pertinent and useful to me in cross examining. I am prepared to clear the court room, go in camera. I have no interest in invading my respect for his trade secrets.

JUDGE BARNES: Do you have any objection to showing it to Mr. Topkis?

MR. SAYLOR: Yes. I think he testified this data was in the company's 5 year future plans. We object to production of those documents to anybody and will not produce them on an in camera basis.

MR. TOPKIS: Let the witness show to your Honor the portion of the document to which he referred to get the market data, not the 5 year plans. I couldn't care less about that.

JUDGE BARNES: May I see the document?

72

THE WITNESS: Yes.

MR. THURMAN: While he is looking at this document, I move again that all prospective witnesses in this case be sequestered from this hearing.

JUDGE BARNES: I think we agreed they would be, didn't we?

MR. THURMAN: All of these are employees, all entitled to stay here and listen? They are allowed one representative from the corporation.

JUDGE BARNES: I don't know. They are allowed one.

MR. THURMAN: I will bring the rules in on this. They can't have everybody here that is going to testify and then say everybody else get the heck out of the court room.

MR. TOPKIS: This is a public hearing as far as I am concerned. I have taken pains to make sure there is no confidential material coming into this record.

JUDGE BARNES: The question is, how many people are going to be witnesses in this case? I assume you brought somebody from Ohio Medical Products?

MR. TOPKIS: Mr. Cosgrove is sitting here.

JUDGE BARNES: Any others from Ohio Medical that will testify?

MR. TOPKIS: Do you want them to stand up. They are from AIRCO or BOC. Mr. Moller is from Fraser Sweatman

Mr. Andy Ray, from BOC is in charge of their Medical Operation for some years. Mr. Reich, AIRCO, Inc. Mr. George Lake was here and left.

MR. THURMAN: All future witnesses.

MR. TOPKIS: Lake is with Harris Lake.

JUDGE BARNES: I am not going to order them to leave the court room. All officials or respondents, one from each company, it seems to me and he is entitled to have one advisor here with him.

MR. THURMAN: He has a court room full every day. Some have even gone back to England, have heard this. One man not even sitting in the court room. Certainly, it is an unfair advantage and I think we have a right to ask that these gentlemen be sequestered. They are listening to testimony. They are not advising.

JUDGE BARNES: I am not going to order it so your objection is on the record. The witness has shown me the projection 1974 through 1979, and I have eliminated, from the document, the future years projection and I am giving you what falls under 1974, for whatever use you may use it for in cross examination, and I ask that you not mention dollar figures unless it is essential.

MR. TOPKIS: Well, these are an estimate, are they not? That is to say, they are not this company's estimates.

JUDGE BARNES: Yes.

MR. TOPKIS: And --

MR. NICKEL: Before he starts questioning, I would like to state, for the record, any time an industry member has an opinion as to the size of a market, they base it on something. If they base it on something they have read or studies, it is not essential they bring into the court room all of the data and materials they relied upon in forming their opinion.

JUDGE BARNES: We had a different situation with this witness. He had it with him just prior to coming in and he had it in his possession. I am ruling, since the witness does not object, Mr. Topkis get this one document for cross examination purposes.

MR. NICKEL: Very well, Your Honor.

By Mr. Topkis:

Q Mr. Scott, the estimate that you have been good enough to show to us is somewhat higher than the estimate that you gave in court?

A Correct.

Q What is the explanation of the difference, sir?

A The subpoena did not ask us for one of the items that is listed there, which was some monitoring equipment, which happens to be used in anesthesia.

Q And your company includes monitoring equipment in its understanding of the term, inhalation anesthesia equipment. Is that right?

A In our definition, yes, we do.

Q Fine. I will then return this, Your Honor, with thanks and I am sorry for having caused the cutting up of your book, Mr. Scott.

A That is all right.

Q Mr. Scott, I will ask you, did you consult any other part of that 5 year plan in connection with your testimony here?

A Not in connection with the testimony, no.

Q Now, Mr. Scott, you named for us, on direct examination, a number of companies engaged in the manufacture of inhalation anesthesia equipment. Do you remember that testimony, sir?

A Yes, I do.

Q I am going to name some other companies to you and ask you whether, according to your understanding, they, too, are engaged in the inhalation anesthesia business. First, a company called Air Shields?

A Yes, they are.

Q They are a very significant manufacturer of ventilators, are they not?

A Right.

Q And Puritan Bennett?

A Yes.

Q They, too, are a significant manufacturer of ventilators?

A Right.

Q And a company called Flextubing, in the disposable breathing circuit business?

A Right.

Q And so too with 3M, Minnesota Mining and Manufacturing?

A Right.

Q They, too, are engaged in the manufacture and sale of disposable breathing circuits?

A Right.

Q Pharmseal, the same is also true?

A Yes.

Q And also a company called Will Russ?

A I am not sure all of these are manufacturers. They are somehow involved in the business.

Q How about Medicon -- are they a manufacturer, to your understanding, or are they not familiar to you?

A I don't think they have anesthesia products.

Q How about Dryden?

A They have some small amount of products, yes.

Q And how about a company called Warne?

A I don't recognize that one.

Q Now, you said, sir, that as to the companies that you listed in response to questions from complaint counsel, that they accounted, according to your estimate for about 90 percent of the total manufacturing of inhalation anesthesia equipment

and accessories. Do you remember that?

A Right.

Q Now, sir, I am going to ask you about those companies, one by one, and going to ask you to estimate for His Honor and the record the dollar quantity of items manufactured by each of those companies in the last year.

A Which --

Q I am going to name them. First, sir, of course, of inhalation anesthetic equipment and accessories -- first, I am going to start with my friends from Ohio?

A Equipment and supplies, about $10,000,000.

Q And how about Harris Lake?

A Around $2,000,000.

Q Fraser Sweatman?

A In the million range.

Q Dupaco?

A Couple of million.

Q North American Drager?

A One and a half to two million.

Q National Catheler?

A I don't recall that one. That gets to the market through either Ohio or American Hospital Supply. I am not sure what their sales are.

Q Rusch? That is, isn't it?

A Yes. I don't recall the exact number for them.

78

Q Can you give us an approximation?

A I would guess between two and three million.

Q How about Portex?

A I think they are in the same range.

Q How about Fraser Sweatman -- we have done that one already. How about Welsh Allen?

A I don't know.

Q Can you approximate it?

A No.

Q Anesthesia Associates?

A I don't know that one either.

Q Bard Parker?

A No.

Q Narco Scientific?

A I would estimate half a million dollars.

Q And Bird?

A Under half a million.

Q Let me ask you about the other companies that you have just mentioned. How about Air Shields?

A I think Air Shields and Narco -- you are referring to the same one.

Q All right. Can you give us a total for the two of them?

A I think it is the previous total.

Q How about Puritan Bennett?

A Small.

Q Of the order of magnitude of what?

A Couple of hundred thousand.

Q How about 3M?

A No estimate.

Q How about Pharmseal?

A Under half a million.

Q Will Russ?

A I don't know.

Q Medicon?

A Almost nothing, I don't know.

Q Dryden?

A Very, very small.

Q Warne?

A Warne is not a manufacturer in this country.

Q They manufacture outside of the United States?

A Right.

Q And they sell in the United States?

A We are one of their manufacturers -- I mean one of their representatives, if you want to put it that way. We call that our own equipment. It is private labeled for us so it is included in our sales.

Q And, of course, we have your sales?

A Right.

Q How about Porter Instrument. You haven't mentioned

them. Do you regard them as being in the inhalation anesthesia field?

A Porter? They are in dental analgesia.

Q You do not regard dental analgesia as part of the inhalation anesthesia field?

A In our company, in our nomenclature, we do not.

Q When you gave that 90 percent figure, did you include your own company?

A Yes.

Q And did you include dental analgesia equipment and accessories? I take it you did not?

A I did not.

Q Does your company make or sell any dental analgesia equipment?

A A very small amount.

Q Of what order of magnitude -- under a million dollars annual sales?

A Way under.

Q Do you make or sell or both?

A We make OEM for another supplier.

Q For whom, sir?

A Litton dental.

Q And you didn't include it in responding to the subpoena from complaint counsel, did you?

A No, we did not.

Q Incidentally, you did include under your listing of anesthesia products, alarms and monitors?

A That is correct.

Q By that item you meant alarms and monitoring devices for operating room use in the course of --

A The alarms that are included there are oxygen alarms, low pressure alarms that are included on anesthesia machines.

Q How about the monitors?

A It does not include -- we talk about monitors for monitoring your heart, your pulse, etc., your temperature during an operation?

Q During anesthetic procedure?

A Yes, it does not include any of those type of monitors.

Q What kind of monitors are included in the third line from the bottom on page B of Exhibit 317?

A They are monitors on the oxygen, the gas machine and the pressure of the gas on the gas machine -- that type of thing.

Q Does your company manufacture or sell any monitoring devices for monitoring in an operating room various aspects of a patient's physical behavior?

A We do now but did not in 1973.

Q Okay. And at the present time, manufacturing or selling such products, would you include them within inhalation anesthetic equipment and accessories, or would you put them in

another category?

A If you define inhalation anesthesia equipment as equipment used to sustain the patient during an operation, then you would not include them, but it is peripheral equipment that is used by the anesthesiologist.

Q It is equipment that is used by the anesthesiologist?

A It is.

Q You said, sir, that among the medical products that Air Products sells, is suction equipment. Do you remember that testimony?

A Yes.

Q What kind of suction equipment is that?

A It is regulation equipment to regulate central suction in a hospital and collection equipment, collecting what is aspirated out of a patient.

Q So there are really two types of suction equipment -- one a kind of pipeline device for a hospital and the other a device for use with a particular patient to get something out of his lungs or something like that. Is that right?

A There are a lot of different types of suction equipment. There are portable pumps, disposable collection systems, there is central vacuum pumps, there are regulators for regulating the vacuum at the wall of the room that it is being used in. The ones we supply, that I mentioned, in manufacture, are

the regulators that regulate it and the bottles that collect it.

Q Your company, then, does not manufacture or sell any devices for sucking substances out of a patient?

A We do not manufacture any devices that suck things out. That is correct.

Q Nor do you sell them?

A Where does the device end? We sell central suction pumps which are put in the basement of a hospital.

Q No, I am laying flat on my back and somebody comes in and sticks a tube in me. Is that made by Air Products?

A No.

Q It is not sold by Air Products?

A No.

Q You might plug that tube into a device on the wall, and that device on the wall would be made by Air Products?

A Correct.

Q And in the bowels of the hospital, there might be a pump supplied by Air Products?

A That is correct.

Q All right. Fine.

If Your Honor please, I am concluded with the witness with the exception of the study that he referred to which he relied upon in advising Your Honor of his estimate of the market. That is to say, the one that is not here in

court today. By whatever technique, I would like to have an opportunity to consult that study with appropriate protections, of course, so that I might satisfy myself as to whether or not the witness's testimony requires cross examination.

JUDGE BARNES: I am not going to require him to produce it. I think his testimony was an estimate and he had one supporting document with him, which I feel is sufficient for cross examination purposes so I am not going to require him to produce another study.

MR. TOPKIS: Very well, Your Honor.

JUDGE BARNES: I want to make sure I have the record clear. I received Commission Exhibit 317A through E in evidence, in camera and it will be subject to Protective Order.

Are there any other questions?

MR. HAWKINS: I have no questions.

MR. NICKEL: We have no questions, Your Honor.

JUDGE BARNES: All right. Thank you. You are excused.

(witness excused).

JUDGE BARNES: How many witnesses do we have tomorrow?

MR. NICKEL: 2, Your Honor.

JUDGE BARNES: Should we start at 9:30 or 10:00?

MR. THURMAN: I would just as soon start at 10:00, if it is all right with Your Honor.

JUDGE BARNES: Do you think we can cover them?

MR. THURMAN: It is another expert in the morning in inhalation therapy area. I didn't anticipate the doctor this morning taking that long. We went from 9:30 to close to 1:00.

JUDGE BARNES: Will you be available at 9:30?

MR. THURMAN: I believe we did tell him 9:30.

MR. TOPKIS: We are ready at 9:30, Your Honor.

JUDGE BARNES: We will adjourn until 9:30 tomorrow morning.

(Whereupon, at 5:00 p.m., the hearing was recessed until 9:30 a.m., the following day, Wednesday, May 22, 1974.)

* * *

[Pages 1380-1455 of the transcript
have been omitted from the joint appendix.]

our witnesses today.

JUDGE BARNES: Is there any other work we can accomplish?

MR. THURMAN: May we have a five-minute break and I think we can accomplish the offering of the remaining exhibits that Complaint Counsel would like to try to have received in evidence.

JUDGE BARNES: I know there were 60, or something like that, you never reoffered.

Let's take a five-minute recess.

(A brief recess was taken.)

JUDGE BARNES: Are you ready to proceed?

MR. THURMAN: I believe so.

Your Honor, Complaint Counsel has originally offered CX-60 and CH-60, to the best of my recollection, was not received in evidence mainly because it was illegible.

We have been furnished a transcript of CX-60, which now encompasses two pages which Complaint Counsel has marked as CX-60-A and B for identification.

At this time, Complaint Counsel offers CX-60-A and B for identification to be received in evidence.

MR. TOPKIS: No objection, Your Honor.

JUDGE BARNES: This is a transcription, as it says, on the Exhibit itself?

MR. THURMAN: Yes, sir.

JUDGE BARNES: All right, I receive Commission Exhibit 60-A and B in evidence.

XXXXX (Commission Exhibit CX-60-A and B was received in evidence.)

MR. THURMAN: Now, likewise, CX-71 was withheld because it was illegible. WE still do not, or we still have not received a transcription which Respondent's Counsel intends to furnish Complaint Counsel, so we would still like to reserve our position or our right to offer CX-71 at a later date.

JUDGE BARNES: All right. Eighty-two was an exhibit I had marked as a reoffer.

MR. THURMAN: Your Honor, we would like to withdraw CX-82.

XXXXXX (Commission Exhibit CX-82 was withdrawn.)

JUDGE BARNES: All right. The next one I have is 93.

MR. THURMAN: Yes, Your Honor. I would like to clear up the record on CX-93. On transcript 625, I quote, "Judge Barnes: I will return 93 to you and I will receive Commission Exhibit 93 in evidence and I believe" what the record should have said what Your Honor intended to say, is "I will receive" or there might have been a mistake in the transcription but "I will receive Commission Exhibit 94 in evidence. So, our recollection is that 93 has not been received yet and we would like to reoffer Commission Exhibit 93 at this time.

JUDGE BARNES: Does the record show that 94 ahs been

received?

MR. THURMAN: No, the record does not show that 94 has been received.

JUDGE BARNES: Should it have been?

MR. THURMAN: Yes, it should have been. I believe it is either a mistake in the transcription or somewhere along the line, I think the record is not clear on that.

JUDGE BARNES: All right, at this time, I will receive in evidence Commission Exhibit 94 and I assume the Reporter already has a copy of it.

MR. THURMAN: Yes.

JUDGE BARNES: If not, you can supply him with one at a later date.

MR. WOLLEN: Our notes indicate that Exhibit 94 was received in Camera. I don't have it in front of me so I don't know what it was. If we are receiving it again, can we receive it in Camera?

MR. THURMAN: I believe Counsel is correct and it was offered and received in Camera.

JUDGE BARNES: All right, I will receive Commission Exhibit 94 in Camera.

MR. THURMAN: No, maybe it is not.

MR. TOPKIS: With apologies to my friend, I don't think he is right.

MR. THURMAN: I believe, Your HOnor, maybe the notes

are fouled up, that 93 is desired to be received in Camera.

MR. TOPKIS: That is true.

MR. WOLDEN: I have no reason to request that 94 be received in Camera.

JUDGE BARNES: Then, let the record show that Commission Exhibit 94 is received in evidence and it is not an in Camera exhibit.

MR. TOPKIS: But 93 is received in Camera, Your Honor, is that correct?

JUDGE BARNES: It is not. They are to reoffer 93.

MR. TOPKIS: Okay, fine.

MR. THURMAN: I thought I would reoffer this, but, if not, we will offer CX-93-A through I to be received in evidence and Respondent's Counsel has requested it be received in Camera and Complaint Counsel has no objection to this document being received in Camera.

JUDGE BARNES: Any objections to Commission Exhibit 93?

MR. TOPKIS: No, YOur Honor.

JUDGE BARNES: There is no objection and I will receive Commission Exhibits 93-A through I in evidence and receive it in Camera.

(Commission Exhibits 93-A through I were received in evidence in Camera.)

MR. THURMAN: Your Honor, Complaint Counsel had

previously offered Commission Exhibits 161-A through E; 162-A through G; 163-A through G and I believe it was withheld because there was some question as to whether these were dollars or just exactly what they represented and we need a statement from Airco, which is Airco's document here, as to what these figures represented and I believe that Airco has stated or is prepared to state that the figures are in dollars.

MR. WOLLEN: I have stated that.

MR. THURMAN: So, Complaint Counsel at this time reoffers Commission Exhibits 161-A through E; 162-A through G; 163-A through G, to be received in evidence.

MR. WOLLEN: We have no objection, I would, however, request since these contain sales figures, that they be received in Camera.

JUDGE BARNES: Any objection?

MR. TOPKIS: If Airco does not object, we don't, YOur Honor.

JUDGE BARNES: All right, I will receive Commission Exhibits 161-A through E in evidence in Camera and I receive Commission Exhibit 162-A through G in Camera, in evidence in Camera and I receive Commission Exhibit 163-A through G in evidence in Camera.

(Commission Exhibits CX-161-A - E; 162-A - G; 163-A - G, were received in evidence in Camera.)

MR. THURMAN: Your Honor, Complaint Counsel has

offered CX-204-A through S-21 and there was an objection to this document and Complaint Counsel withdraws the offer of this document.

(Commission Exhibit CX-204-A - S-21 was withdrawn.)

JUDGE BARNES: There was a Commission Exhibit 192-A through F and my notes say you will reoffer that and I wonder if you are going to withdraw that one, also?

MR. THURMAN: Excuse me, Your Honor, if you want to take them in order, yes, Complaint Counsel withdraws CX-192-A through F.

(Commission Exhibit CX-192-A through F was withdrawn.)

JUDGE BARNES: I have a Commission Exhibit 123 that you said would be reoffered.

MR. THURMAN: Excuse me a minute, Your Honor, our records apparently are not as complete as Your Honor's and we would like to look at this.

YOur Honor, Complaint Counsel withdraws CX-123.

(Commission Exhibit CX-123 was withdrawn.)

JUDGE BARNES: Well, that leaves us with the one Commission Exhibit 73 still.

MR. THURMAN: Was it 71?

JUDGE BARNES: I am sorry, 71 still to be reoffered.

MR. THURMAN: Yes, Your Honor.

JUDGE BARNES: Are there any other exhibits? You should not rely on my records. I make some notes but I am not

sure mine are complete so you have to rely on your own.

MR. THURMAN: Your Honor, we believe that this is all that has to be reoffered but Mr. Topkis has offered us -- strike that.

We have been operating under, I think, a handicap, I think, in not having transcripts, daily transcripts, so Mr. Topkis has graciously offered us the use of his daily transcripts and we would like, before we foreclosed on offering or saying "this is all we will reoffer," we would like to check the transcripts to see exactly what has been received in evidence and have that reservation that we may reoffer something that we may have overlooked that should be in evidence or should be offered that has not been offered.

JUDGE BARNES: I think you may have a reservation on all those that have been listed. There is no objection to that, is there?

MR. TOPKIS: Of course not, Your Honor. As a matter of fact, I may say, according to our understanding, with apologies to the Reporter, the transcript is not a model of accuracy on what has been received and what is not and we are proposing to attempt to agree, and I am sure we will be able to with Complaint Counsel, on some suggestions we have as to errors.

But surely there is no problem about this. What they want to offer, we will see to it that they offer it. We are not going to make any problems about that.

JUDGE BARNES: All right.

MR. THURMAN: What we would like to do, with Your Honor's permission, I think is, that would help clarify the record if there is some discrepancy in the reporting, is maybe offer a complete exhibit list at the end of our case indicating that each exhibit, whether it was received or rejected or withdrawn.

JUDGE BARNES: I prefer to rely on the written record. Now, we can make any changes in the written record that you feel is necessary but I would not want to have an exhibit take preference over the transcript.

MR. THURMAN: Complaint Counsel offers Commission Exhibit 300-A through D for identification to be received in evidence.

MR. TOPKIS: No objection, Your Honor.

JUDGE BARNES: All right, I will receive Commission Exhibit 300-A through D in evidence.

XXXX (Commission Exhibit CX-300-A - D was received in evidence.)

MR. THURMAN: Your Honor, Complaint Counsel offers CX-301-A through 3 for identification to be received in evidence.

MR. TOPKIS: Your Honor, as to that one, we have a very major problem.

This is a document entitled "BOC Growth" and that is

the total, totally of BOC around the world. That is a five-year summary. It has sales information and appropriate information for BOC all over the world, going back to 1968, and it has forecasts all over the world going up to 1978, I believe, 1978 or 1979.

JUDGE BARNES: Five years behind and five years forward?

MR. TOPKIS: Right, all over the world.

Your Honor, insofar as this company is concerned, there is no more secret document. We have, of course, made it available to Complaint Counsel under the most strict protective order, but I am directed by my client to advise Your Honor that if this ever became public in any fashion, it could have the most serious impact upon the price of the stock of BOC on the London exchange and the most serious impact upon the officers of BOC because this is the kind of information the shareholders of British companies never see and they don't see it in American companies either, I am not singling out British companies.

That is the kind of gut document that no company can afford to become known to anybody and while I have reasonable confidence in in Camera treatment, the best way to keep it secret is not to disclose it and there is nothing in this document, Your Honor, and I ask Your Honor to look at it before making a determination, there is nothing in this document that

has a thing to do with this case.

If this document demonstrates that BOC is an international company with great activity around the world, therewith, just about nothing in the United States, it does demonstrate that but that is about all it shows.

JUDGE BARNES: Mr. Thurman, do you really intend to offer the entire exhibit?

MR. THURMAN: Your Honor, that was our intention. I will tell you why: In our opinion, I can appreciate Mr. Topkis' concern, but they get themselves involved in this law suit and I think it is incumbent upon Complaint Counsel to give evidence that we feel is relevant.

We would like with as much protection as possible to be given this document, but we think this shows BOC's capabilities and what they are in and that they were -- it is, sir, the most likely or one of the most likely entrants in this U. S. market, which fits right in with their plans.

It is a fairly complete document concerning BOC. I think it is extremely relevant to this case.

JUDGE BARNES: In what way?

MR. THURMAN: To show BOC is a company and what they are doing throughout the world and this is a market they are not in and their potentiality in this market.

JUDGE BARNES: Yes, but there is no question as to whether or not they were in this market.

MR. THURMAN: That they were in this market in gas? No, they were not in this market in gas.

JUDGE BARNES: You don't think this document proffers that?

MR. THURMAN: I think we have actually proved it already.

JUDGE BARNES: Isn't there some type of public information available to show the net sales of their company and profits before and after tax? That must be public information.

MR. TOPKIS: Sure, Your Honor, our annual reports, they are all in evidence.

JUDGE BARNES: Why not put an annual report in? That shows they are doing business in Singapore if that is relevant. In Asia, they are doing business in Asia. If there is anything in here that indicates that they are going to enter the United States market, I think it might be relevant but I doubt if profits alone would bear on that.

MR. TOPKIS: Your Honor, in point of fact, there may be one line in this whole report that is relevant and that is the forecast of average capital to be employed around the world because the entry in the United States is close to zero. That is what was forecast, and that is page "K".

JUDGE BARNES: Can't we put in an annual report?

MR. THURMAN: I don't think so. Just a minute, Your Honor, I don't think the annual reports will show what this

document shows. This document shows how they dominate this market, UK, they are completely dominant in this market.

If Mr. Topkis will stipulate that they have extensive capital and their position that they are one of the most likely entrants into the industrial gas markets in this country, there is no need for this document.

MR. TOPKIS: If I gave you the nails and hammer, will you treat me in kindly fashion?

MR. THURMAN: This might be a nail. I don't blame him in trying to keep this nail out of the record but using confidentiality is not good reason to keep this out of the record. It has never been held in any case that confidentiality of the document is sufficient to keep it out, as long as it is relevant and I believe we have adequately shown this is relevant and Mr. Topkis has been saying for days a document such as this is the best evidence and we would certainly like to have something,in that is the best evidence to show what BOC's position was in several markets.

MR. TOPKIS: That is likely comfort in almost any case but I respectfully submit the only line of this that is relevant is what we would expected would happen in the United States.

That does appear on page "K" and I would not object to that. That is North America and it includes Canada, and it shows a piddling expectation.

MR. THURMAN: Your Honor, I hope I am not interrupting, but I would like to add it is my understanding that this goes also to Section 35 Charge, that this document was turned over to Airco.

This is one of the documents to show how they would get together.

JUDGE BARNES: I thought we went through it the other day and decided if the merger was not unlawful, there was no Section 5.

MR. THURMAN: Absolutely, that was the agreement but this adds up to how they were getting together and seeing how it was advantageous for them to get together as marriage partners.

MR. TOPKIS: Your Honor, I have not made anything in this case of the fact that I am representing a company that is alien to our laws and our culture but they tell me that, as they view matters, this could not be a more confidential sacred document and they have asked me to implore Your Honor to treat it gently.

And I can't say more than that. I can say to you, though, there is not a thing in here that has anything to do with this case except that one line that I am prepared to have come in.

JUDGE BARNES: Let me ask you, if we had -- if we had the annual report, what would it show us? Do we have a BOC

annual report in the record?

MR. TOPKIS: Yes, it is already in the record.

MR. THURMAN: There is no breakdown in the annual report like this breaks it down.

JUDGE BARNES: Of course not. I can see, for example, in looking through here on page 301-C, it has gas sales in the United Kingdom and Europe, four years, which might be relevant. Certainly, advanced engineering, Sparklets International, Food Service has no relevance in this case.

MR. THURMAN: Your Honor, in this case, I have not, maybe as I have in previous cases, excised non-relevant material.

In most cases I have tried, I have only offered in evidence lines and such material. We would certainly be willing to excise non-relevant materials in this case.

JUDGE BARNES: I am going to ask you to do this and you don't have to do it today or tomorrow but certainly, Mr. Thurman, by our first day in New York, go through Exhibit 301 and tell me the exact figures in there, you desire in evidence and tell me why and tell me why they are not in an annual report.

If you can show me those figures and, then, tell me they are relevant, we will consider receiving it and receiving only those figures in evidence. The rest will be excised.

MR. THURMAN: Yes, Your Honor.

Your Honor, we had listed on Exhibit list, CX-302 but we have nothing for that number. It is just omitted.

JUDGE BARNES: All right.

MR. THURMAN: Now, Your Honor, I believe we brought up the other day on the record the Complaint Counsel had submitted a second supplemental exhibit list and, Your Honor, if I recall, correctly, asked, has it been assigned an Exhibit number and we say that we were going to add sub-numbers to that, to the other list, and now at this time, Complaint Counsel offers CX-303-S-11 and -12 for identification to be received in evidence as the Complaint Counsel's second supplemental exhibit list.

JUDGE BARNES: I will receive Commission Exhibit 303-S-11 and S-12 in evidence only as an identification of documents which Compalint Counsel has offered.

(Commission Exhibit CX-303-S-11 and S-12 was received in evidence.)

MR. THURMAN: One problem, Your Honor, on these exhibit lists, we introduced some exhibits like Curriculum Vitae which is not on the lists and if YOur Honor desires, we will make up another Exhibit list to cover those.

JUDGE BARNES: I believe they were identified when they were received officially, if I remember.

MR. THURMAN: Commission Exhibit 304-A through C, as listed on CX-303-S-11 has been withdrawn, which was an

affidavit of Daniel L. MacGinnis.

(Commission Exhibit 304-A through C was withdrawn.)

MR. THURMAN: It is my understanding that Commission Exhibit 305-A through S-26 has already previously been received in evidence.

MR. TOPKIS: No, Your Honor. That is that Liquid Air preliminary prospectus which Your Honor will perhaps recall.

JUDGE BARNES: I recall it but I don't recall -- well, I believe I rejected this exhibit, didn't I?

MR. THURMAN: No, it was a plan. I don't know that number. What was the plan?

Well I see the plan is 297 and maybe before we go into the Exhibit, I could refer to it on the record.

MR. TOPKIS: Your Honor, you may have been reflecting your attitude in what you just said but what the record said was, I asked Your Honor for leave for time in which to study that preliminary prospectus and Your Honor consented and directed I have such time and I now advise the Court we do object to it.

It is patent hearsay.

MR. THURMAN: I don't have -- I am speaking off of the top of my head when I said it was received. If Mr. Topkis says it was not received, I am sure he is correct, having the transcript.

JUDGE BARNES: What is the purpose of this offer?

MR. THURMAN: WE think it is -- well, we agree with

Mr. Topkis that it is hearsay but we believe it is reliable hearsay. It is certainly filed with the SEC.

JUDGE DAWES: What does it offer to prove?

MR. THURMAN: Your Honor, I just had my memory refreshed that we were, I believe it was one of my witnesses that I was personally examining, Mr. Demster, regarding questions within this Exhibit which had not been offered and Mr. Topkis said that he, or that this document was his best evidence and that he would like to examine it before it was offered.

So, I believe Your Honor stated at that time, "Let him examine it and reoffer the exhibit."

That was the only reason we reoffered the exhibit, to supplement what Mr. Demster was not allowed to testify to. I never heard of this procedure before, that you could not interrogate a witness on something because there is a document that might say the same thing.

JUDGE DAWES: Is this the Red hearing prospectus?

MR. TOPKIS: Yes.

MR. THURMAN: Yes. Due to Mr. Topkis's interruption that this was the best evidence, we terminated our interrogation of Mr. Demster. In fact, I was pleased to hear this remark, that you cannot examine a witness on a document because, I am sure, the best evidence rule will apply when Mr. Topkis puts on his defense, or he will not examine any witness

on any document, that that will be the best evidence.

MR. TOPKIS: Your Honor, I am sorry.

JUDGE BARNES: I would like to see that place in the transcript.

MR. TOPKIS: I can show it to Your Honor happily. The problem started at page, it looks like, I can't tell the number, but the question put to the witness by Mr. Thurman was this:

What was the condition ---

JUDGE BARNES: Yes, let me look at it.

I believe the record shows that Mr. Krulla marked the exhibit Commission Exhibit 305 and Mr. Topkis now reserved comment on it, "until I have a chance to look at it."

I stated, I will reserve ruling until Respondent's Counsel have a chance to look at the document.

Now, we will consider the offer and I would like to ask Mr. Thurman what is your purpose in offering this exhibit? The witness testified the company was losing money in 1968 when they purchased it and I believe he said something like $4 million.

What more do you need with this prospectus?

MR. THURMAN: Well ---

JUDGE BARNES: You have the sales figure of Liquid Air in the record.

MR. THURMAN: Your Honor, I am kind of at a

disadvantage about what all went on in the transcript with Mr. -- I don't know what the results were, but I don't know why we told them -- well, certainly, at the time, they must have said what the relevance was.

To cut it short, I am not really prepared to go through and maybe I had better reoffer it in the morning when there is a chance to study it.

JUDGE BARNES: I think you better.

I don't see any relevance to it. The witness' testimony is in the record and Mr. Topkis requested the Exhibit for cross-examination purpose and that is why the subject matter came up.

MR. THURMAN: I am sure there is plenty of relevancy throughout the document. I am just not prepared at this time because -- well, I agree annual reports and prospectus and all of this, this is hearsay.

JUDGE BARNES: I notice that Mr. Topkis has listed an awful lot of such documents for your case.

MR. TOPKIS: Yes, Your Honor.

JUDGE BARNES: WE are going to have problems, maybe, getting them into the record.

MR. TOPKIS: I think Complaint Counsel is stipulating with us as to their competence.

JUDGE BARNES: These were ---

MR. TOPKIS: Annual reports of the various companies

engaged in the business in the United States, Your Honor, and what we are out to do is give Your Honor some feeling for how large these companies are and for purpose of statistical analysis of how they compare with Airco and anything else that is around or might be around.

JUDGE BARNES: Total company size?

MR. TOPKIS: And profitability and we are going to have an Economist testify, Statistician Economist, testify on the basis of these reports.

JUDGE BARNES: Do you have any objection on Commission Exhibit 305? That is more or less a public document showing the size.

MR. TOPKIS: Well, the only parts of these documents, that is, annual reports that I am offering, and I asked Complaint Counsel to stipulate to, are the financial statements contained therein.

These are financial statements which have certified to their reliability, the fact that nationally known accounting firms in each case prepared them.

JUDGE BARNES: There will be some from Liquid Air in that group?

MR. TOPKIS: I think there are but not the Red hearing prospectus and Red hearings do not have a free degree of finality and subject to modification that in light of demands of FTC and other regulation agencies.

JUDGE BARNES: What does Red hearing mean in that context? I was not exactly sure.

MR. TOPKIS: I can tell Your Honor on the basis of my experience.

When you file a registration statement with the Commission, it is in draft form subject to modification and you may circulate it around on a preliminary basis under the Commission rules and I am looking around to make sure I am stating this correctly.

JUDGE BARNES: This is SEC?

MR. TOPKIS: Right.

But it bears on the margin a legend which, of course, in this xerox, does not show up but the legend in the left margin is printed in red typically and it is a warning "this is not a final document" and for that reason with the talent we sometimes have for catch phrases, these came to be called "Red hearing prospectus."

JUDGE BARNES: Very well, I was under the impression that "Red hearing" meant it was something unlawful and that should not have existed but I take it the document was properly filed?

MR. TOPKIS: Yes, but it is a preliminary document. The final document does not have the Redhearing statement alleged on it.

JUDGE BARNES: Mr. Thurman, I suggest that you reoffer

305 at some point when you can tell me exactly what you are offering it for.

MR. THURMAN: Yes. I certainly will abide by Your Honor's order.

I would like to say, I think we did at least, at least my people did agree to stipulate the financial section of the annual reports but I see no difference in an annual report and this as far as reliability.

I am surprised at an objection to a filing with the SEC and yet, a request for admissibility stipulation on an annual report or any other type documents which are similar.

I would only like to say at this time, and I think maybe Your Honor's order is better than what I am going to say but I would like to point out on page 8 or CX-305-H and 305-I it describes that American Cryogenics was an unprofitable company at the time they purchased it and that they had turned it around to be a profitable company and eliminated the unprofitable portions of the company.

And a statement to a stockholder, if you read this, certainly, it should be reliable. And in my experience, I have never heard of anything wrong with going into evidence on collaboration, a document collaborating a witness' testimony.

Something they put on the public record is turning something around, so I am kind of amazed we supposedly, and maybe I misunderstood what our restrictions are,but supposedly

in a document, says something you can't have a witness say something on this.

So, for that purpose and other purposes in this document, is why we would like this document, or why we have offered this document to be received in evidence.

But if Your Honor would like to stick by his order, we will certainly point out other things in the document tomorrow.

JUDGE BARNES: Well, I just read a portion of the witness' testimony and he did testify it was losing money when they bought it and I seem to recall that he said they were now making money.

So ---

MR. THURMAN: That is collaboration of that particular point I just read and certainly there is nothing wrong with corroborating evidence and certainly I think it should strengthen teh evidence.

JUDGE BARNES: Take it up with Mr. Topkis and perhaps you can do horse trading if he has a lot of summary exhibits.

MR. THURMAN: I am not a good horse trader and maybe I would lose on this.

MR. TOPKIS: I don't think I will stipulate to anything than I stipulated to here.

The witness did testify he was losing something and I have no doubt about it and I have no reason to doubt it and

there is no reason to corroborate it.

JUDGE BARNES: And check the transcript and see if his testimony says they turned it around in which event, you don't need corroboration.

MR. THURMAN: I assume Mr. Topkis will agree they turned the company around.

JUDGE BARNES: No, I think you had better read the transcript first.

i nt

fols.

JUDGE BARNES: All right. Can we go to another exhibit?

From 305 to 311 -- Well, are you offering 306 to 311?

MR. THURMAN: Yes, Your Honor. Complaint counsel offers 306-A through S for identification, through CX-311 to be received in evidence.

JUDGE BARNES: These are Airco financial items.

MR. WOLLEN: Yes.

We certainly have no objection to them. I do have a comment about them, though. We received these yesterday afternoon. I must confess I have not looked at them until just recently. We spent most of today trying to revise a stipulation which had been proposed to us by the staff with respect to the very matters which are contained on these documents, namely, the sales figures of products sold by Ohio Medical Division of Airco.

I must say these are the records of the Ohio Medical Division, and we have no objection to having these received and then having to go back to my hotel tonight and work on a stipulation which says the same thing. It seems to me it should be one way or the other.

MR. THURMAN: Maybe we are premature on this if they say the same thing.

MR. WOLLEN: Just for your information, 306, -7 and

-8 are equipment sales performance reports of the Ohio Medical Division of Airco which include line by line breakouts indicating type of product and the percent dollar amount of sales 1972 and 1973.

MR. THURMAN: I would have to agree with counsel all we are asking for is sales data, and the stipulation says -- Excuse me, Your Honor, just a minute.

(Discussion off the record.)

MR. THURMAN: Your Honor, I think it is proper to wait until we see the stipulation.

MR. WOLLEN: You proposed a stipulation for us, for us to fill in numbers as to sales of Ohio Medical, and all I am saying, these exhibits cover every product we sold.

MR. YOUNGWOOD: No, they don't.

Your Honor, the proposed stipulation talked about products which were manufactured by Ohio Medical and sold by Ohio Medical. The documents to which Mr. Wollen refers do not so specify.

The stipulation also refers to products which were sold in the United States, and the document to which Mr. Wollen refers strictly limits itself as to the United States, and I think we would be happy to hear that if it did.

MR. WOLLEN: It says, "U. S. Domestic."

MR.YOUNGWOOD: Any defense sales in domestic?

MR. WOLLEN: There are Defense sales on separate Exhibit 308.

MR. YOUNGWOOD: Are Defense sales domestic sales at all?

MR. WOLLEN: You mean, are any part of our Defense sales made abroad?

I don't know the answer to that question.

MR. YOUNGWOOD: That is the question.

MR. WOLLEN: All that has to do is with Exhibit 308. is that correct?

MR. THURMAN: I would like to withhold these offers. If we get the stipulation on sales, that is all we really want.

MR. WOLLEN: I am told that Exhibit 308 labelled "Defense Sales" has "Defense Sales Domestic."

MR. THURMAN: I am not going to argue over whether the document or stipulation goes in. We just want the sales.

JUDGE BARNES: Let's wait, but I must caution you not to get in three or four different sets of figures.

MR. THURMAN: Absolutely; we want a good, solid figure that we can rely on for this case. That is all we are asking for. I certainly don't want conflicting figures to go in in the case.

MR. WOLLEN: Certainly this is the best evidence.

MR. THURMAN: I think properly, the stipulation

would be where we get the precise figures of what their sales are, it will be more appropriate information, more appropriate for the case.

JUDGE BARNES: Are there any other exhibits we can receive today or consider today?

MR. THURMAN: Your Honor, I would like to go back to CX-297, which was a rejected exhibit and went into the rejected file, and we had a layman's transcription of French involved in that exhibit, so we would like to offer at this time, to be included with that exhibit, the official Berlitz interpretation of the French as CX-297-S-20 through S-24.

MR. TOPKIS: No objection.

JUDGE BARNES: You may do that, but I believe we took care of that at a previous occasion, but in case we did not.

MR. THURMAN: I don't believe it went in the record. Maybe we didn't have it, but at least Your Honor can state we could do this, but I don't think it is in the record.

JUDGE BARNES: I take it the Berlitz transcription will be the official version for this proceeding and that goes into the rejected exhibit file?

MR. THURMAN: Yes.

(CX-297-S-20 through S-24 was accepted to go into the Rejected file.)

MR. THURMAN: Your Honor, I think we would like to hold off on CX-309-A through C, which I think a stipulation will cure.

This also applies to CX-310 and CX-311.

Your Honor, complaint counsel offers CX-312-A through K for identification to be received in evidence. I have not specified exactly this number, it is a doucment, but the only portion we are interested in in this document is, of course, the relevancy and the relevancy is the industrial gas portion of this.

This is a census report that takes in other SIC numbers.

Excuse me. This document relates to industrial gas, but some relate to certain areas, but we are only interested in the United States as a whole.

JUDGE BARNES: Any objection?

MR. TOPKIS: Your Honor will perhaps recall-- Excuse me a second.

MR. THURMAN: Before the objection, maybe I should explain, Your Honor, this is a document I believe Your Honor should take judicial notice of.

MR. TOPKIS: Your Honor --

Your Honor will perhaps recall that complaint counsel, I think it was the first witness, Mr.Flam, on this subject of industrial gas, told us that the industry does

not accept these reports as being reliable.

I don't suppose on the basis of that testimony alone Your Honor would exclude these reports. I am not going to argue at length that they should be excluded.

I would, however, formally note my objection to their receipt on the basis of Mr. Flam's testimony and also urge Your Honor to treat them with the caution suggested by the testimony of industry people who have testified here.

MR. THURMAN: Your Honor, I would like to point out at this time,at this time, I think this will be an issue in the case. Mr. Flam, I am not sure of the pronunciation, but Mr. Flam, of Linde, merely stated -- Well, he could not state for the industry, but merely stated that the data called for by census was not the way they kept records, that they consider their sales of all re-sales, gas they purchase, and on down. This is gas -- the gas as called for by census, which is very clearly in the instructions, what they were getting, and everybody reporting the same way, is f.o.b. plant of gas produced.

That is all we are interested in, the single count, because Mr.Flam and his company does not keep records of what they actually produced and have a f.o.b. price, they still can figure that price, and he believed that figure on the stand, and because he could keep his records another way, and he includes re-sales and otherportions within his total sales does not in any way or manner affect the reliability

of what is reported in census.

The census asks for definite shipments of produced gas at f.o.b. So this in no way discredits census.

Of course, this is arguable really in the findings rather than at this time.

JUDGE BARNES: I was going to say this is a matter for briefing. I think the precedents are that this information is received in commission proceedings, and I will receive Commission Exhibits CX-312-A through K on the basis of official notice.

I will take official notice of the report.

(Commission Exhibits CX-312-A through K were received on the basis of Official Notice.)

JUDGE BARNES: Are you offering 313?

That seems to be the only one I have.

MR. THURMAN: Yes, I think the last Exhibit is CX-313 for identification, to be received in evidence.

MR.TOPKIS: No objection,Your Honor.

JUDGE BARNES: All right. I will receive Commission Exhibit 313 in evidence.

(Commission Exhibit CX-313 for identification was received in evidence.)

MR. THURMAN: I believe this wraps up our offer of exhibits except for the reservations, the stipulations and reservations we made.

JUDGE BARNES: Well, if you can handle some more of them tomorrow, fine.

We have two witnesses for tomorrow.

MR. THURMAN: Yes, and they will be fairly short similar to the witness this afternoon, and we will try to get both witnesses in the morning.

JUDGE BARNES: 9:30?

MR. TOPKIS: Fine.

JUDGE BARNES: We will adjourn until 9:30 tomorrow morning.

(Whereupon, at 3:50 p.m., the hearing was recessed, to be reconvened at 9:30 a.m., Thursday, May 23, 1974.)

* * *

[Pages 1488-1583 of the transcript
have been omitted from the joint appendix.]

By Mr. Hoagland:

Q Mr. McWhinnie, do the pictures that were shown to you, RX-21, 22, 23, do those pictures depict the entire operation of Orequip?

A In buildings, yes.

MR. HOAGLAND: No further questions, Your Honor.

MR. KAPLAN: No recross, Your Honor.

JUDGE BARNES: I have no further questions of Mr. McWhinnie. Thank you very much.

(Witness excused)

JUDGE BARNES: Is there anything moreher at this time?

MR. THURMAN: Your Honor, we have further exhibits but I believe we will hold reservations on offering them.

JUDGE BARNES: Just five or six, something of that kind?

MR. THURMAN: Yes. We have one exhibit right now which Mr. Nickel would like to offer.

MR. NICKEL: Your Honor, when Mr. Scott of Air Projects tesified you may recall he indicated with respect to the sales statement that was introduced there was a discrepancy with respect to one item, and he would submit a letter to correct that discrepancy, and he has.

I would like to introduce this as part of Commission Exhibit 917, and it constitutes pages F and G. Actually, these two pages have the same material. The second page, page G, is a handwritten note of Mr. Scott and signed by him,

and the preceding page is the typewritten version of that same information.

JUDGE BARNES: All right, so commission Exjnibit 317 has previously been received in camera and these are two pages which will be added to that as Commission Exhibit 317 F and G.

Is there objection?

MR. TOPKIS: NO.

JUDGE BARNES: I will receive Commission Exhibit 317-F and G in evidence in camera.

(The documents referred to were marked Commisson Exhibits CX 317-F and RX 317-G for identification (in camera), and were received in evidence.)

MR. NICKEL: Thank you, Your Honor.

MR. THURMAN: Now I don't know if you want to take it up at this time, Your Honor, I could excise anything in 301-A through -S, which is BOC's data concerning EOC. I can certainly offer it now or in New York, one of the two.

JUDGE BARNES: Let me suggest you propose to me an excised version that you wish to offer. Go ahead and make the excision and when we get to New York on June 5 I will take a look at your excised version and rule on it then.

MR. THURMAN: Did you want to take up the red herring(?) practice on Liquid Aire at this time, or in New York?

That is CX-305.

JUDGE BARNES: I thought we disposed of that.

MR. THURMAN: Is it in the record?

JUDGE BARNES: I don't believe it is in the record.

MR. THURMAN: I don't know how we could dispose of it unless there is an ruling. There are many relevant portions of this document and I am not sure how it was disposed of. If it was rejected we would have to go to the rejected file, if it has been, but if not we would like to have a ruling on it. I just don't know where we stand on this documen.

JUDGE BARNES: All rig ht, the exhibit originally came up when Mr. Topkis wished a copy of it for cross-examination purposes and he was given a copy for cross-examination purposes, and during that exchange you said you would offer it.

MR. THURMAN: Right.

JUDGE BARNES: But I don't really see the purpose of the offer. Have you the witness' testimony in the record. You were interested in establishing that the company was losing money and that it had turned around and apparently the record reflects that now. I see no point in receiving that exhibit.

MR. THURMAN: Your Honor, it gives his earnings for instance.

JUDGE BARNES: We have not gone into earnings of any of the other companies. Why should we go into earnings of Liquid Air.

MR. THURMAN: We will save it for rebuttal.

JUDGE BARNES: I think that is a good idea. At this

time I reject Commission Exhibit 305.

MR. THURMAN: You reject it?

JUDGE BARNES: I will reject it and you can offer it.

MR. THURMAN: It will go in rejected file if you reject it. Can we hold it?

JUDGE BARNES: I will place it in rejected file but I suggest you wait until the defense puts it in and at that time I will finally rule on the rejected eibbit

MR. THURMAN: I would as soon withdraw it rather than it go into the rejected file and reoffer it at a later date.

JUDGE BARNES: All right, your case in chief is going to be over one of these days and you are not going to be able to offer the exhibit.

MR. THURMAN: Maybe I am not familiar with the procedure, if it goes into rejected file can we reoffer it if necessary on --

JUDGE BARNES: On cross-examination of a witness.

MR. THURMAN: Or on rebuttal?

JUDGE BARNES: Yes.

MR. THURMAN: Then it can go in rejected file.

JUDGE BARNES: I will reject commission Exhibit 305 and ask it be placed in the rejected exhibit file.

(The document referred to, heretofore marked Commission Exhibit CX-305 for identification, was rejected.)

MR. THURMAN: We offer CX-241, the heading and paragraph 4, we are just offering rather paragraph 4, and CX-241-C, paragraph 4, and the signature and date and the "copies to".

MR. TOPKIS: Do we have the same or similar documents? Is this it?

JUDGE BARNES: I don't understand why you are only offering part of the document. Did we have a problem with 214? What was the status of that?

MR. TOPKIS: It had been withdrawn.

MR. THURMAN: Now, the reason we offer part of it, we think it is what is relevant to the United States market. I have to objection to the entire document going in, though, but I was just offering what we consider should go in the record, those two paragraphs.

MR. TOPKIS: I am a little puzxzed, Your Honor. Offhand, a memo written by Mr. Perham, then a consultant of BOC, certainly seems unobjectionable but when this document was originally offered or discussed by Complaint Counsel, Mr. Youngwood said to Your Honor, and I quote, "Your Honor, I might comment one reason it was withdrawn is that the information that we have is that it is not accurate. We have that information from more than one source."

Now, I don't know what Mr. Youngwood was talking about and in what respect the document is inaccurate, but I hesitate to

see a document that Complaint Counsel tells me is inaccurate go into the record, although ordinarily, as I say, I would not be concerned.

MR. THURMAN: Your Honor, regardless of what was said, I don't know whether it is taken out of context or talking about this document or what. Obviously, the portions that Complaint Counsel is offering into evidence, Complaint Counsel is not saying on the one hand it is inaccurate, and on the other we want it in evidence, or I would not be offering it. I don't really believe yo have to give a reason why you withdraw it. I just withdraw it. But these are two paragraphs that I think are relevant to this case.

JUDGE BARNES: That is on the first page, paragraph --

MR. THURMAN: Four.

JUDGE BARNES: And on --

MR. THURMAN: 214(c), paragraph 4.

Yes, paragraph 4. That is the only relevant things I can see about the document. I say no reason to offer the rest of it. I am just offering those two paragraphs which I think are relevant to this case.

JUDGE BARNES: Well, it seems to me that Gardiner is mentioned thoughout the document, not just in the two paragraphs you mentioned, and the entire document should be in the record or not at all.

MR. THURMAN: I have put in many documents --

JUDGE BARNES: If you have no objection I will put in the two paragraphs.

MR. TOPKIS: I would rather have the whole document if it comes in at all. I would like to know what part that specifically Mr. Youngwood would think would be inaccurate.

JUDGE BARNES: Can you enligthen us on the previous statement?

MR. YOUNGWOOD. I would like to read the record because I don't have it in front of me and I would like to comment at a future time after I read the record. I don't recall exactly what I said or recall what was said three or four minutes before or after.

MR. THURMAN: This document is not worth arguing over and I will just withdraw it again.

Now that is all we have except the documents we will offer in New York.

JUDGE BARNES: I take it you have a stipulation that you will offer when -- in New York?

MR. THURMAN: Yes.

JUDGE BARNES: And it will be finalized on the opening day?

MR. TOPKIS: Some of them are already finalized.

JUDGE BARNES: AT least you will know what his case in chief consists of by that time?

MR. TOPKIS: Yes, I take it as of right now the

Complaint Counsel remembers with the exception of putting in those stipulations which we are in the process of negotiating, some of which we have already concluded and a couple of other exhibits, as to which there has been reference.

JUDGE BARNES: And as to which we have already discussed at one time or another?

MR. TOPKIS: Yes.

JUDGE BARNES: Is that the extent of your case?

MR. TOPKIS: Yes, with reservation, and the reservation is if something would happen which I don't expect to happen with the stipulation.

JUDGE BARNES: Yes.

MR. THURMAN: We certainly would have to call a witness to get that. We want to try to get the stipulations of these companies in the record. That is all we expect to offer in the case in chief.

JUDGE BERNES: Remaining in the case in chief then are sales figures which we trust will be the subject of stipulatons and some few documents in which we have discussed at one time or another in this case, otherwise your case is completed?

MR. THURMAN: Yes.

JUDGE BERNES: Are we prepared to go forward on June 5?

MR. TOPKIS: Yes.

JUDGE BARNES: I will issue an order setting up the hearing room and it will be in the Federal Building. Do you

know where that is?

MR. TOPKIS: GSA Building across from the Courthouse.

JUDGE BARNES: Yes.

MR. WOLLEN: Might I inquire? You will recall yesterday there was some discussion as to whether Complaint Counsel really wanted to offer some remaining comments or to have a stipulation with respect to some of the information contained in those exhibits, and at that time I said that in view of the offer of exhibits I didn't see why we were working on the stipulation.

Might I inquire from you whether Complaint Counsel has decided whether he desires those?

JUDGE BARNES: That is right, you had three or four exhibits from Arco and you had a proposal for a stipulation. Have you decided which way you are going to go?

MR. THURMAN: We prefer to consider the stipulation and make it perhaps a little clearer.

MR. WOLLEN: Thanks.

JUDGE BARNES: We will let those stand until the stipulation is completed in New York and then those will be withdrawn if you agree upon a stipulation.

MR. WOLLEN: I have no objection to these exhibits and I would be delighted to have them received right now.

JUDGE BARNES: In lieu of a stipulation?

MR. WOLLEN: Yes, in lieu of a stipulation. I don't

see why I should work on a stipulation if we have the exhibits.

MR. THURMAN: We would rather have a stipulation, and if there is no way to work that out we might want to call a witness from Airco rather than to say "These documents are it and that is it", and we can work out a stipulation and have it clear and that is what we want to do.

If we cannot and we don't believe the exhibits fully support or completely show what needs to be shown, then we might have to call an Airco witness, it is as simple as that.

MR. WOLLEN: That is not very simple. The problem with that is the stipulation that was proposed to us does not have any dollar figures in the categories that Complaint Counsel set forth on the stipulations, the proposed stipulation. I assume from that that what they want us to do is to go through these proposed exhibits and to fill in the blanks.

It seems to me, then, if Complaint Counsel wants a stipulation from us they can put in those dollar figures from the exhibits as well as we can and we will consider that.

Alternatively, I think the documents should have been admitted and we should not go through the process.

MR. THURMAN: We want it to go in the record and we will stell them in the stipulation what we want.

MR. [illegible] That is not the stipulation we proposed to you.

MR. THURMAN: Mr. Wade told us to give them blanks

and they would fill them in. That is where the blanks come in.

JUDGE BARNES: You have given them the blank forms with the categories you want the sales figures on?

MR. THURMAN: Yes.

MR. WILLEN: We have forms with the blanks but I don't believe we should fill in the blanks on a medical stipulation.

MR. THURMAN: If you fill it in on gas, I see no reason why they can't fill it in in medical on the record.

MR. WOLLEN: Do you want to fill in those numbers for us?

MR. THURMAN: Airco is in a better position to tell us what your sales are in the market than we are.

MR. WOLLEN: That is right and these are exhibits and it has every sale on every part.

MR. THURMAN: Resales and various other things, and that is what we want in this record.

JUDGE BARNES: It seems to me the real problem here is who is going to write the figures down.

MR. THURMAN: And who knows what is in there ? Airco?

MR. YOUNGWOOD: We don't know it.

JUDGE BARNES: You do not know. He said you have exhibits quite the figures.

MR. THURMAN: Not the figures we are asking for, and I said if we can't work out the stipulation we have to call

on someone in Airco.

JUDGE BARNES: Airco should provide the figures Complaint Counsel wants and if you can't provide them for those categories perhaps he will have to call a witness, but I think the sales figures should come from Airco. But there is a problem certainly I should not have to get involved in.

MR. THURMAN: Right.

MR. WOLLEN: Well, we think we can work it out. My only point all of these figures are in the proposed exhibits.

JUDGE BARNES: They are not the words they want. I won't get into that. We have to get the sales figures of Airco in the record before Complaint Counsel will close his case. We will start in New York on June 5 and I would assume that 10 o'clock will be all right for the first morning.

MR. TOPKIS: Yes.

JUDGE BARNES: And we need a schedule of witnesses.

MR. TOPKIS: We already supplied that, Your Honor. I hope to be preparing it as we go along and will advise the Complaint Counsel and Your Honor as rapidly as possible.

JUDGE BARNES: How many days? We have eight days, Your Honor, and I expect to beat that. Eight trial days.

MR. THURMAN: I don't believe I have a calendar.

MR. TOPKIS: I can give you a better reading after three days, close to Friday I can give you a better estimate.

MR. THURMAN: Your Honor, I don't believe we have a

calendar of when the witnesses will appear.

MR. TOPKIS: We have the order. I don't use a calendar. I put a witness on the stand as soon as the immediately preceding one finishes.

JUDGE BARNES: He has an order of appearance and we will keep going.

MR. THURMAN: If it is in order, I guess we can't object to that.

I assume from Mr. Topkis' previous order he would make BOC respondents available to us prior to the witness stand.

MRL TOPKIS: BOC people. They have all been deposed.

MR. THURMAN: I don't think everybody is on the list.

MR. TPPKIS: If you want to talk to Mr. Ray we will have him available the day before he testifies, if he does testify. The same is true of the others.

JUDGE BARNES: We will adjourn until 10 o'clock on June 5 in New York City.

(Whereupon, at 1:00 p.m. the hearing was adjourned, to reconvene at 10:00 a.m. Wednesday, June 5, 1974, in the Federal Building, New York City.)

C O N T E N T S

FOR THE COMMISSION:	DIRECT	CROSS	REDIRECT	RECROSS
Leslie Edward Smith	1638			
(Voir Dire pp. 1672)	1680			
(Voir Dire pp. 1688)	1694			
(Voir Dire pp. 1695)	1697			

E X H I B I T S

FOR THE COMMISSION:	IDENTIFIED	RECEIVED	REJECTED
325-A&B(IN CAMERA)		1612	
326-A thru Z54(IN CAMERA)		1613	
327-A thru Z15(IN CAMERA)		1614	
328 (IN CAMERA)		1614	
329-A thru X(IN CAMERA)		1616	
330-A thru G(IN CAMERA)		1616	
332-A thru C(IN CAMERA)		1620	
333(IN CAMERA)		1620	
FOR THE RESPONDENT: (BOC)	IDENTIFIED	RECEIVED	REJECTED
222-A thru C		1679	
223		1679	
57-A thru H		1691	
60-A thru Z2		1696	
181-A thru D		1702	
62-A thru S(IN CAMERA ON PP.1710)		1705	
67-A thru J		1712	

* * *

BEFORE THE

FEDERAL TRADE COMMISSION

---x

In the Matter of:

BRITISH OXYGEN COMPANY, LTD., BOC FINANCIAL CORPORATION, BOC HOLDINGS, LTD., BRITISH OXYGEN INVESTMENTS, LTD., AIRCO, INC.

Docket No. 8955

---x

Hearing Room D
26 Federal Plaza
New York, New York
Wednesday, June 5, 1974

Met, pursuant to notice, at 9:30 a.m.

BEFORE:

K. KEITH THURMAN, GORDON YOUNGWOOD, DON PURCELL, DARYL HICKEL, RHETT KRULIA and JOHN HOAGLAND, On behalf of the Federal Trade Commission

JAY H. TOPKIS, LEWIS A. KAPLAN and MOSES SILVERMAN, Paul, Weiss, Rifkind, Wharton and Garrison, 345 Park Avenue, New York, New York, 10022, on behalf of respondent, British Oxygen Company, Ltd.

FOSTER WOLLEN, R. BRUCE MAC WHORTER and DANFORTH, NEWCOMB, Shearman and Sterling, 53 Wall Street, New York, New York, 10005, on behalf of respondent AIRCO, INC.

ROBERT L. DOAN, assistant general counsel, Union Carbide Corporation, 270 Park Avenue, New York, New York, and ALEXANDER W. SIEROK, Wald, Harkrader and Ross, 1829 19th Street, N.W., Washington, D.C., 20938, on behalf of Union Carbide Corporation

P R O C E E D I N G S

JUDGE BARNES: The hearing will come to order.

Mr. Thurman?

MR. THURMAN: YourHonor, at this time, complaint counsel reoffers Commission Exhibit 301A through Q.

This is an exmied version of the BOC five-year plan.

JUDGE BARNES: Is there an y objection to this exhibit?

MR. TOPKIS: Your Honor, we were banded a copy of it 15 seconds ago.

I haven't had an opportunity to review it at this time.

Perhaps we can defer consideration of it.

JUDGE BARNES: We will defer consideration of Commission Exhibit 301.

We will give respondents an opportunity to examine it.

MR. THURMAN: Your Honor, I am a littleembarrassed but there is nothing I can do about this.

We haven't got the stipulations signed yet and that is what we wanted to do today.

I would request your honor to go ahead with defense and we'll put the stipulations in as soon as we can get them signed.

JUDGE BARNES: You have had seven working days and two weekends.

You have had more than that. You have had ten working days and two weekends in which to get these few remaining exhibits ready to be offered in evidence this morning.

I am a little emba-rassed myself to see how apparently you are so disorganized.

I am going to require you to tell me right now exactly how many exhibits you have that you are going to offer and how many witnesses you are going to call.

The understanding was that you were to complete your case the first thing on Wednesday morn ing and we are prepared right now to complete your case in chief.

I've got to know what you have what you intend to offer. I have been hearing about stipulations since we started the trial.

MR. THURMAN: Your Honor, I can't twist their arm. They came down Monday to work down the final stipulation.

As far as we are concerned they are ready to be signed.

We were handed a stipulation this morning, the first time I've seen it.

Contrary to any statements that were made, it is the first time I have seen it.

They said we are not signing until you sign this.

The argument that it is quid pro quo, it is not quid pro quo on one side's thinking.

We said what we'll sign and based on the stipulations that they are going to give us, we are certainly not going to back down on it but it is going to be on the same basis that we sign.

I can't be handed one this morning and they say either you sign this or else we won't sign.

That is where the embarrassment is now, your Honor, we just don't have the signatures.

JUDGE BARNES: Get the subpoenas and we'll put the Airco officials on the witness stand if that is what is going to take them to sign.

You have six counsel and Airco has had five or six counsel in the hearing room.

We discussed that at the last hearing in Washington.

I am getting a little disturbed about this now.

MR. THURMAN: I don't blame you, your Honor. It is not Airco. Airco is willing to sign the stipulation, it is not Airco. It is BOC.

JUDGE BARNES: What does BOC have to stipulate to?

MR. THURMAN: party companies. Supposedly it is all checked out.

We don't know what the prdlem in signing it is.

They will have to respond to that. I was led to believe that there was no problem with this and that it would be introduced.

All we needed was a signature.

Now they say we are not going co sign this until we get some quid pro quo.

That is not the way to enter into stipulations.

JUDGE BARNES: Mr. Topkis, what is the problem?

MR. TOPKIS: Your Honor, Mr. Thurman is right, stipulating is a two-way street.

I will let Mr. Kaplan explain it to you.

MR. KAPLAN: Your Honor, BOC is dealing with four pieces of paper, four stipulations.

One involves a stipulation on our part that the various documents that complaint counsel received pursuant to their third party subpoena on medical equipment may be received in evidence with various restrictions as to whether they are conclusive or not.

That stipulation was mailed to complaint counsel with a signatuse and as far as I know they have it.

The second stipulation deals with the sales of two British subsidiaries, Harris, Swetman -- we sent

that to complaint counsel and we are prepared to sign it at thismoment.

The one I sent to complaint counsel may be signed, I don't know.

The third st ulation deals with the census reports on value of sh cs of gases by the producing companies or some of roducing companies.

We had a meeting in Washington with complaint counsel some weeks back on one of the days we adjourned early.

During that meeting we discussed the question as to whether we would be willing to enter into stipulations, what kind of materials would be given to us to verify the accuracy of the figures tendered and secondly, whether complaint counsel would be willing to make some concession toward us.

My understanding and I impute no ill will or anything, there may be a misunderstanding here, was that Mr. Youngwood and Mr. N ickel, not Mr. Thurman, and I and Airco counsel worked out an agreement whereby the census figures and their admissibility would be stipulated to and complaint counsel would stipulate to the figures on our exhibit list and to the admissibility, not necessarily the accuracy, of the figures on consumption and of oxygen by steel companies as reported to the

American Iron & Steel Institute.

We worked those stipulations out on a piece of paper.

We went back and as far as I understood, it was agreed that our willingness to stipulate on the census figures and their admissibility was contingent upon complaint counsel's willingness to allow the data to be received in evidence.

It was the stipulation as to the gas census figures which we hold out and will not sign until we reach agreement as to the other item.

But, that is the only area of dispute.

The whole medical area, as I understand it, is taken care of.

JUDGE BARNES: Mr. Youngwood, what is the hold up on your stipulation?

MR. THURMAN: If your Honor will allow me, I will speak for Mr. Youngwood, as far as the Iron Institute and the annual reports.

I am surprised they want annual reports submitted when a prospectus was not admissible and put in our rejected file.

It seems strange that complaint counsel will agree to something that is not good evidence as being admissible when a better document was denied

admissibility.

JUDGE BARNES: I called the attention of all parties to the fact that BOC had elicited many annual reports of many companies and it was my understanding at that time that there would be no objection to receiving those.

MR. THURMAN: I am not going to back down on that.

I see -- for whatever it is worth, I don't know what these financial statements say.

They are probably consolidated and I don't think they are any good for the record at all.

I am not going to back down on that. I just think it is strange to stipulate to something that is not as good as something that was rejected.

As far as the iron and steel industry, I have no problem in saying that this is what they said was reported to them.

W-e are not going to say that they reported this because we have to see what was reported.

We gave the census of many companies, confidential material that was not subpoenable. We got this through the grace of third parties thatyou can look at these, get the stipulation.

We showed them to counsel and said this is

what the companies said they reported.

The stipulation for iron and steel, I would be willing to do the same thing.

You show me what they reported and we'll see.

Otherwise, I'll say this is what the institute said the company said they reported.

JUDGE BARNES: That is all he is offering it for.

MR. THURMAN: It might be one company, maybe one steel company had all that production.

So I am not going to take the plural. Maybe one company reported it.

This is what the iron institute people say they put out.

You know, you can tell an association anything. You go to a census and you are under oath and under penalty.

You can tell the association anything.

I have no objection to stipulating that this is what was reported by the iron and steel industry, by them, and let it in the record.

JUDGE BARNES: All right, fine.

MR. THURMAN: But I am not going to stipulate that actually, in fact, these companies reported it

unless they show us where they actually in fact reported it like we did with census.

That is the quid pro quothat we are talking about.

They give us the same quid that we gave them.

MR. KAPLAN: Your Honor, I frankly don't know what the fuss is all about.

Mr. Thurman was not present on the occasion when I believe we approached agreement on this. I believe an agreement was reached.

I would like to read this:

It says manufacturers of steel reported to the American Iron & Steel Institute reported that they consumed the following quantities of oxygen in the following years.

Then it goes on to say that the figures reported are the acqual quantities produced in the United States -- this is not binding upon complaint counsel.

They are certainly open to argue the weight of the evidence.

I might add that the American Iron & Steel Institute is one of the most respected and comprehensive trade associations in the United States.

It won't take me long in the library to find an anti-trust case where the government has relied on

data supplied by that institute.

I find it incongruous.

MR. THURMAN: I think Mr. Kaplan -- my associates said that that is not what they agreed to.

They can speak for themselves.

Secondly, I challenge Mr. Kaplan when he says that this is a well-respected association and that the government has used it.

If they used it, they used it with back-up documents and they didn't accept it blindly.

If we can get census documents --

JUDGE BARNES: Where is the institute located?

MR. THURMAN: I don't know.

MR. KAPLAN: I believe it is in New York.

JUDGE BARNES: Can't you send one of your men over and look at the back-up data?

MR. THURMAN: We furnished the census data.

I can send somebody over if they will allow us to.

We have copies from all third parties on -- the Iron Institute data stuff is not as sensitive as the census data.

We can introduce the census documents. We have no problem there.

If they want to back down on their stipulation

and say we are not going to do what we said we are going to do and we will call Airco --

JUDGE BARNES: We are at the point where we have to make a decision.

This is your case.

Now, how are you going ot proceed?

MR. THURMAN: I either want a signature from them or we'll call witnesses.

JUDGE BARNES: Are you going to sign their stipulation?

I state to Mr. Tppkis right now and this is the first time I've seen this stipulation, we'll stipulate that this is what the association said was received.

JUDGE BARNES: I believe that is what Mr. Kaplan read.

MR. THURMAN: I don't know what it reads.

MR. TOPKIS: That is from a failure of the English language and not as a result of a failure in our position.

We have the annual statistical report, American Iron & Steel Institute.

I am sure complaint counsel have copies also. If they don't they have weeks in which they could have obtained copies. We gave them copies, as a matter of fact.

If they want to look at our copies they may. It seems to me as though this is a tempest in a tea pot.

MR. THURMAN: It says manufacturers of steel reported to the American Iron Institute that they consumed the following quantities of oxygen in the following years.

I don't know that they reported that. Why can't they do what we did and show us what it is.

It may be one company, U. S. Steel, for instance, might be the only one.

MR. KAPLAN: Consumed oxygen?

MR. THURMAN: Consumed and produced their own.

I don't know what relevancy this has to this case, to start with, when a steel company consumed so much oxygen.

Naturally somebody consumes it or these people wouldn't be in business.

I don't dney that. But, to say that these companies reported this, I dont' know whether they reported it or not.

The associationput outpamphlets saying they did. I don't know how accurate it is or not. I don't know why you need a stipulation.

He has on that what American Steel said they reported.

MR. TOPKIS: We will offer the documents then.

MR. THURMAN: If you want the stipulation, we'll say this is what they say was reported and that is as far as I will go.

JUDGE BARNES: Let's offer the actual exhibit.

MR. THURMAN: I don't think it is admissible but we won't object to it because as soon as we get the stipulation signed we will object to it, when we get our stipulation signed.

JUDGE BARNES: Let's move the case on now.

Offer your stipulation.

MR. TOPKIS: BOX stipulations 54,55 and 56 we now offer.

JUDGE BARNES: I take it the exhibits don't show which was produced by the companies or which was purchased. It just says consumed.

MR. TOPKIS: It shows both, what they produced and what they consumed.

They produced less than what they consumed.

MR. THURMAN: Your Honor, I don't see the relevancy in that document.

I would like to know the purpose of it.

JUDGE BARNES: You can object on the grounds of relevancy but not for any other basis.

MR. THURMAN: I don't know what they are putting it in for.

I think it is their obligation to state what they areputting it in for.

JUDGE BARNES: When he offers it.

MR. THURMAN: I thought he offered it.

JUDGE BARNES: He will, in due course.

MR. THURMAN: Your Honor, complaint counsel offers CX-325A and B for identification to be received in evidence as CX-325A and B, in camera.

JUDGE BARNES: Can you describe the exhibit?

MR. THURMAN: It is a confidential stipulation of shipments fob plant per the top eight companies in the industrial gases market as reported by these companies to the Bureau of Census for calendar year 1972.

JUDGE BARNES: Is there any objection?

MR. TOPKIS: No, your Honor.

MR. WOLLEN: Objection to the statement that it is the top eight companies.

JUDGE BARNES: It is seven companies.

MR. THURMAN: What complaint counsel believes is the top seven companies.

MR. WOLLEN: Linde is not there.

MR. THURMAN: Their figures are in the record.

JUDGE BARNES: Any objection to the stipulation?

MR. WOLLEN: No objection.

JUDGE BARNES: I will receive Commission Exhibit 325 A and B inevidence in camera.

(Commission Exhibit 325A and B received in evidence, in camera.)

JUDGEBARNES: Why are these in camera if this is census data?

MR. THURMAN: This is very highly confidential. This is what is reported to census which is not subpoenable by the government or anyone else.

JUDGE BARNES: And the census figures is not by company name?

MR. THURMAN: The census is total.

That is to break down the share of what census says it is.

JUDGE BARNES: I will receive the exhibit in camera.

MR. THURMAN: I realize we haven't been doing very long, but may we have a ten-minute break to hasten this up?

JUDGE BARNES: Very well.

I hope it hastens it up. We will take a ten-minute recess.

(Recess taken.)

JUDGE BARNES: Let's proceed.

MR. THURMAN: Your Honor, complaint counsel offers CX-326A through CX-326Z-54 for identification to be received in evidence as CX-326A through Z-54.

This is a stipulation as to sales of medical products by various companies.

The parties submitting this infomration have requested in camera treatment be given this since there is sales data concerning the various companies.

JUDGE BARNES: Any objection?

MR. TOPKIS: No objection.

MR. WOLLEN: No objection.

JUDGE BARNES: I will receive it in camera.

(Commission Exhibit 326A through Z-54 received in evidence, in camera.)

MR. THURMAN: Your Honor, complaint counsel offers 326A through -- that is CX-326A through CX-327Z-15 for identification, to be received in evidence as CX-327A through Z-15.

This is a confidential stipulation and in camera treatment is requested showing the sales figures of medical equipment by BOC.

MR. TOPKIS: By Fraser-Sweatman Harris Lake, I believe.

JUEGE BARNES: Any objection to Commission Exhibit 327?

ME. TOPKIS: No, your Honor, although we do request in camera treatment.

MR. WOLLEN: N o objection.

JUDGE BARNES: I will receive Commission Exhibit 327A through Z-15 in camera.

(Commission Exhibit 327A through A-15 received in evidence, in camera.)

MR. THURMAN: Your Honor, complaint counsel offers CX-328 for identification to be received in evidence as CX-328.

This is sales to U.S.A. by BOC, by third parties meaning other than to Sweatman Harris & Lake.

JUDGE BARNES: What kind of products?

MR. THURMAN: Medical products.

I assume they want in camera treatment of this document, its sales,'69 through February of '74.

MR. TOPKIS: We want in camera treatment for a peculiar reason and that is because they are so trivial.

JUDGE BARNES: It would be embarrassing to your company.

MR. TOPKIS: Exactly.

JUDGE BARNES: I will receive Commission Exhibit 328 in evidence in camera.

(Commission Exhibit 328 received in evidence, in camera.)

MR. THURMAN: I would comment that probably a lot of companies would like to have those sales.

MR. TOPKIS: Including almost any gas station in town.

MR. THURMAN: I might add, that the figures are in pounds on that last document.

MR. TOPKIS: Two and a half times zero is still zero.

MR. THURMAN: We don't believe it is two and a half times zero, though.

JUDGE BARNES: All right, let's move on.

MR. THURMAN: Complaint counsel offers CX-329 A through CX-329 X for identification to be received in evidence, in camera.

This is additional sales of companies, the original material submitted was not accepted by respondent so, complaint counsel had to go back and get additional back-up to arrive at a stipulation.

This is not underCX-328A but -- A through Z-54, but Mr. Topkis or Mr. Kaplan agreed that this is to fall under that stipulation even though it has a different number.

MR. TOPKIS: That is correct.

JUDGE BARNES: These are additional sales of medical products to companies which are not shown on

Exhibit 326?

MR. THURMAN: That is correct.

JUDGE BARNES: Any objection?

MR. TOPKIS: No objection.

They are subject to the same terms as the others.

JUDGE BARNES: I will receive Commission Exhibit 329A through X in evidence in camera.

(Commission Exhibit CX-329A through X received in evidence, in camera.)

MR. THURMAN: Complaint counsel offers CX-320 A through G for identification to be received in evidence and even though we don't have confidential stipulation on it, I believe Airco wants in camera treatment given to this.

These are sales figures by Airco, they are medical products.

JUDGE BARNES: Ohio Medical?

MR. THURMAN: Yes.

JUDGE BARNES: Any objection?

MR. TOPKIS: No objection.

JUDGE BARNES: I will receive Commission Exhibit 330A through G in evidence, in camera.

MR. THURMAN: Complaint --

JUDGE BARNES: It is received in camera.

(Commission Exhibit 330A through G received in evidence, in camera.)

MR. THURMAN: Your Honor, complaint counsel just received a third page of that stipulation this morning.

We are not too familiar with the products on this.

Complaint counsel offers CX-331 for identification to be received in evidence.

This is a catalog of Ohio products which explains these products.

Now, this is what I would consider bound, even though it has looseleaf pages in it. It is a bound document which would require only one number unless your Honorwould idrect us to paginate it with letters A through whatever it is.

It had not been done at this time.

MR. WOLLEN: It is looseleafed because it has been changing from time to time and I don't know what point in time that document was obtained by the staff.

MR. THURMAN: During this investigation of this case.

I don't know the exact date but certainly the present time period.

We are sure --

MR. WOLLEN: I am not objecting to it, Mr. Thurman.

I am just saying that I think it shouldbe identified separately page by page.

JUDGE BARNES: Mr. Thurman, do we need that big exhibit in the record?

MR. THURMAN: Well, I believe so, to show these various products.

JUDGE BARNES: Don't you know what flex adaptors are?

Any objection to the exhibit.

MR. WOLLEN: No objection, your Honor.

My point is that it goes far behond the products involved in this case and it cahnges fromtime to time. So, I don't know what varsioncomplaint counsel has now.

But I have no objection to it being receivéd.

JUDGE BARNES: I notehere that there is a lot of piping systems here.

Piping systems went out of the case and I would like not to burden the record.

MR. THURMAN: We would be happy to offer pages or sections in that catalog that pertain to this case and mark it accordingly.

JUDGEBARNES: Let's reserve on this and ask that you do go through it and eliminate evetything that

you don't want in there and then paginate it and then reoffer it.

MR. THURMAN: Complaint counsel offers CX-332 A through CX-332C for identification to be received in evidence.

At this time I believe it is also appropriate to offer CX-333 in evidence to be received as CX-333.

These two exhibits are letters directed to Mr. Youngwood of the Commission from Mr. Silverman of Paul, Weiss, with a copy to Mr. Wade, Airco's counsel.

These explain why -- they explain some sales data.

JUDGE BARNES: What is the date?

MR. THURMAN: The date of theletter on CX-332A through C is May 2, 1974 and the letter -- strike that.

Exhibit CX-333 is dated May 15, 1974.

I don't know whether these are -- I don't know if they request these in camera or not.

MR. TOPKIS: Yes.

JUDGE BARNES: Any objection?

MR. TOPKIS: No, your Honor.

MR. WOLLEN: No objection, your Honor.

JUDGE BARNES: I will receive Commission 332A through C and 333 in evidence, in camera.

(Commission Exhibits 332A through C and 333 received in evidence, in camera.)

MR. THURMAN: Your Honor, on Commission Exhibit 327, respirometers listed in this stipulation, I believe it is Exhibit 327 -- pages 8 and 9, I don't know what the CX number is on that.

CX-327-I, sales of respirometers, are not applicable, according to this stipulation to therapy equipment and the footnote says sales of respirometers are included -- use of respirometers for inhalation and anesthesia equipment.

It is clear that some of these are used for therapy and some are used for anesthesia inhalation -- respiration inhalation equipment.

We would like to know he breakdown of the BOC sales to Harris Lake, Fraser Sweatman.

We would like to know which way those went, either for therapy or anasthesia and complaint counsel would -- we are willing to make a breakdown of this particular product.

I don't know the solution. I would say either we call a witness to get a breakdown. This is the only thing hanging up closing our case right now.

MR. TOPKIS: It is a statement I keep hearing over and over again.

An answer is that a monkey wrench can be used for a variety of purposes and when I sell one I don't know what the purchaser is going to use it for.

A respirometer is in the same category.

They can call the great Lord Jehovah and he can't tell the people -- well, perhaps he could but with the exception of that one witness, I don't think anybody could answer the question.

MR. THURMAN: We will accept it as that.

It has been testified to that they have been used for one or the othr and I think they can make a breakdown.

If they don't want to do that, I just wanted to bring it out on the record that there is no breakdown.

JUDGE BARNES: I was just wondering how substantial the sales were, not to go into dollar figures.

Where are respirometers reported?

You were willing to accept the exhibit as it stands then?

MR. THURMAN: Yes.

We would certainly like to have a breakdown but if they won't stipulate to it, we'll have to accept it as it is.

I don't know of any other solution.

They have had a chance to look at CX--

MR. TOPKIS: We haven't, your Honor.

I wanted to discuss that with my clients.

JUDGE BARNES: You may offer 301 and 331 at a later date, if you feel you want that big book in the record.

MT. THURMAN: We definitely want some of it in there.

JUDGE BARNES: Try to cut it back as much as you can and reoffer it.

Is there anything else to your case?

MR. THURMAN: No, your Honor, nothing else.

JUDGE BARNES: With the exception of the two exhibits, your case in chief is closed; is that correct?

MR. THURMAN: Yes,your Honor.

MR. TOPKIS: At that point, your Honor, I move to dismiss on the ground, well, the usual grounds.

I think we have probably wasted enough time this morn ing.

I don't imagine your Honor would want to hear me at leng th on the subject.

JUDGE BARNES: No.

We usually require the defense to go on and take up a motion to dismiss at the conclusion of the case.

MR. TOPKIS: That is what I had expected.

I would, however, your Honor, if it meets with your Honor's approval, take a few minutes to sketch in for you what we intend to offer as our case in chief.

JUDGE BARNES: That would be helpful.

MR. WOLLEN: If I may, before Mr. Topkis starts to do that, I would like to join Mr. Topkis in the motion to dismiss on behalf of Airco.

I would also point out for your Honor, for the record, that Airco is charged only with violation of Section 5 of the Federal Trade Commission Act here.

Complaint counsel have referred to two agreements, one of July and one of December 1973, in essence, as constituting their case against Airco.

Those agreements have not even been referred to by a single witness who has taken the stand in this case.

We would move to dismiss not only on the usual ground but on the additional ground that there is just no evidence to prove a Section 5 violation.

JUDGE BARNES: I believe some concession was made by complaint counsel earlier when I brought this Airco matter up, wasn't it?

What was stated at that time?

MR. THURMAN: The agreements speak for them-

selves and there is no need to put in additional evidence at this point.

We said this encouraged the acquisition and that the Section 5 case hinged on the Section 7 case.

MR. WOLLEN: Y-our Honor, it was discussed on the record before.

I just wanted to point out that -- at this point so it was clear at the close of complaint counsel's case.

JUDGE BARNES: I will take your motion under advisement.

It may require findings to be filed later on, perhaps.

Mr. Topkis?

MR. TOPKIS: I will make this brief, your Honor.

I am sure that it comes as no surprise to you at this point that we are dealing here ptimarily with a gas case.

We will prove as part of our case in chief that the suggetion by counsel, complaint counsel that there is a market in industrial gases is a suggestion without foundation.

We are dealing with a whole range of different products which are made by different techniques, by

different companies, which are sold to different customers by different lines of distribution which are used by those customers for different purposes and your Honor will perhaps recall the suggestion that carbon monoxide and carbon dioxide are not really suitable for oxygen in many processes that we can think of.

There is no price interrelationship among these cases.

That by all of the customary standards which she shall develop as matters of fact, that these products don't come into what can fairly be called a market.

We will demonstrate further, yourHonor, that as far as what your Honor has heard of tonnage sales and merchant sales, that the -- it really would be more accurate to draw a line of division there, if wer wanted to talk about the air separation gases, nitrogen, oxygen and argon, principally, we would suggest to your Honor, and we will prove that there is what might be fairly described as a world market in the construction and supply of tonnage air separation plants.

That there are companies which compete around the world for this business.

That they opdrate in the United States and elsewhere.

But there is another market and that is the

merchant sale of gases in the United States butthat is a market -- that is not any one market in fair contemplation.

Your Honor heard witness after witness called by complaint counsel testify that you don't ship these things more than two or three hundred miles and we would suggest to your Honor that if there would be any area of competition here, that it would be a kind of series of little circles dotted around the country, many of them overlapping, no doubt about that.

But it could neves be suggested that anybody sellingmerchant gas in Maine competes significantly with anyone selling it in Florida.

JUDGE BARNES: Some of the gases were sold nation-wide, though; correct?

MR. TOPKIS: Helium and very few others.

Only the specialty ones and that is not suggested by complaint counsel as being a special market.

So far as helium is concerned, while it is sold nationwide, it is sold world-wide.

There are only two or three places around theworld where you can get helium.

So muchwith the markets with which we are dealing.

We will offer your Honor proof on the question of had we not acquired an interest in Airco, we would

have entered the American market and we will offer proof that we had looked into the possibility and concluded with regret that we just couldn't crack it.

That there were better places where we could invest our money without taking on that battle.

We will also prove to your Honor that if there be any potential into the American gases field, there are a lot of them far more likely or at least as likely as BOC.

There are the other national gases companies. There are American Steel & Petroleum and petro chemical companies, all of whom are experienced in the manufacture of air separation and other gases, all of them far more likely, all of them possessed of resources to go into the market any time that the price situation suggested to them.

And that will be our gases evidence.

And then we will come to the medical side of this case and to call it a medical side is, I think, outrageous to inflate its significance.

I think it can fairly be said that the medical aspect here is what might be called the after-thought case.

We all know how this case had its genesis.

There was an industrial gases investigation under way by the Commission which dates back over a

year ago and we -- when Airco and BoC got together, the Commission took a look but the interest was in terms of industrial gases.

So, I think it fair to say that medical equipment isn't really a very significant matter here and that certain is borne out by the volume of trade that we are dealing with.

BOC is a company that last year enjoyed 769 million dollars of gross sales and it is -- the American subsidiary sellingmedical equipment accounted for a shade over around $4 million and not all of that, by any means is in the two lines of business that the Commission says are involved here, so called anesthesia equipment and inhalation equipment.

Fraser Sweatman, Harris Lake account for under one per cent of BOC sales.

Your Honor has heard of Fraser Sweatman selling anesthesia machines, and they did, last year, they sold $59,662 worth of anesthesia machines.

Harris Lake sold $192,000 worth of anesthesia machines.

We are dealing with -- there must be something smaller than peanuts which will come to me after I sit down.

I recall with gratitude that in a spirit of

candor, Commission counsel agreed that they would not push their case on medical pipelines and welding.

I would earnestly invite them to consider applying the same spirit of candor to the entire medical side of this case.

We will put on witnesses who will testify about that if they don't accept my warm invitation.

To give you an -- a rundown of who our witnesses will be, the lead-off will be the BOC chairman, Mr. Leslie Smith, who will tell your Honor what BOC is, how it operates and why it has done what it did here and how it viewed the American scene, what efforts it might or might not have made to become active on that scene in the event that it hadn't acquired an interest in Airco.

Our next witness will be teh president and chief operating officer of Airco, Mr. Richard Jordan, who will tell us about Airco and about the nuts and bolts of the business that Airco is engaged in, most particularly, of course, the gas business.

We shall then call Messrs. Alan Perum and Ray Dow of Kenox, the BOC subsidiary that operates in Canada.

Mr. Perum is one of the two authors of the Perum-Greenfield report of the BOC possibility of business in the United States and generally, these two gentlemen

will tell you the whole story of this Canddian Behemoth poised on the borders of the United States threatening to invade.

We will then call four experts, your Honor, Dr. Kridl of Stamford Research, Mr. Robert Nathan who has his own economic consulting firm, Mr. Lichhard of the Boston Consulting Group and Mr. Karnath of Arthur D. Little.

JUDGE BARNES: You said earlier you would not call Mr. Nathan.

MR. TOPKIS: We have rethought that, your Honor. I assure your Honor that he will be very, very brief.

I don't wthink we will do any other rethinking but I hope your Honor will indulge us, if we decide here that one or another of the witnesses we have listed may, in the lgiht of what we have seen or perhaps another, one or two.

If we have to offer anyone else, I will offer your Honor a full explanation of why.

In any event, the unusual thing about these expert witnesses is that they are not the usual kind of experts.

We all know the usual expert witness who is a honorable man who comes into Court to testify because he was invited to come into Court, familiarize himself

with a situation and testify about it.

We know that all expert witnesses of that kind are a little bit subject to attack, as a matter of credibility by reason of the very fact that they have been retained to testify in this case and but for that retainer they would not have come forward.

Three of the four witnesses with whom we deal here are not in that category.

With the exception of Mr. Nathan and that means the other three witnesses, they are all going to be testifying on the basis of work that they did before this case ever came up.

And so there will be testimony offered to your Honor as bearing a little bit more of an index of reliability than the usual testimony of an expert witness.

So far as Mr. Nathan is concerned, he will be our economic theoretician and we will ask him a hypothetical question or two and that will be the scope of his testimony.

We will then call Mr. Danny Cosgrove of the Ohio Medical Division of Airco who will endeavor to tell your Honor about the nuts and bolts of medical equipment and we will call Mr. George Lake who runs Harris Lake, BOC, American sub andhe will tell your Honor about that

enterprise and our present expectation is to conclude with a witness whom your Honor has seen before, Mr. Peter Laister, and as far as Mr. Laister is concerned, about the best I can tell your Honor in the way of forecasting his testimony, whatever we forget to ask other witnesses, we will trouble Mr. Laister with.

JUDGE BARNES: He will be the cleanpup witness?

MR. TOPKIS: A utility in fielder type of thing.

I see we both love baseball. That will be our case.

JUDGE BARNES: Is Airco going to put on any witnesses or will you conduct the defense --

MR. WOLLEN: It is our present intention to call Mr. George Dillon who is the chairman and chief executive officer of Airco whose testimony will revolve basically around two agreements between BOC and Airco, how they came about and the relations between BOC and Airco during that period of time.

JUDGE BARNES: Is Mr. Dillon the gentleman who used to be in government service?

MR. WOLLEN: I think that was a different Mr. Dillon.

JUDGE BARNES: Thank you.

All right, Mr. Thurman?

MR. THURMAN: I suppose you don't want rebuttal of the opening statement.

We disagree with much of it.

I would like to clear up something here, several things before we go to the witnesses being called, on the basis of what Mr. Topkis has said.

I would like to ask if that was the order in which they will be called.

MR. TOPKIS: That is my expectation.

JUDGE BARNES: Are you saying that these three people are not being paid to appear as experts?

MR. TOPKIS: I didn't say anything of the sort. We expect to pay all of them their daily fees.

MR. THURMAN: Expert fees?

What is that?

MR. TOPKIS: I don't know. You will have to ask them. They haven't billed me yet. If you would like me to send it on to you, I would be delighted.

MR. THURMAN: Also, my understanding from the opening statement was that there would be testimony from three of the four experts on way-back material, probably not relevant to this case, but I would like to know what studies that they are going to be testifying to.

We would like to see the studies, see the material that they used.

I understand that some of the material are non-public studies.

We can't go to a public source and look at this background material which may be, allegedly made this witness an expert.

So, we would like to have this non-public background material to seeif this expert is, indeed, an expert and indeed knows what he is talking about compared to this case and these markets, as alleged.

I believe that is all I have without rebutting any opening statement.

By the way, these experts refused to talk to me on advice of counsel for respondent, without them being present, which, I don't think is quite fair, where they talk to every one of our people without us being present.

They had free access tocomplaint counsel's witnesses.

I see nothing fair about saying we want to sit and listen to what you are goingto ask.

So, I think in fairness, complaint counsel should have quid pro quo here since that has been a favorite term of respondent's counsel.

We should be allowed to talk to these people, these experts.

For that matter, we ought to be allowed to talk to all of their witnesses.

We ought to be allowed to talk to thechairman of the board who is going to take the stand, without them being present.

They did it to us.

That is the other point.

I think we ought to have access to witnesses without counsel being present.

Counsel went out and said to these people, don't you talk to these people when we are not present.

MR. TOPKIS: Obviously my telephone has been bugged.

MR. THURMAN: This is what the witnesses said to me.

JUDGE BARNES: It is customary, I think, for the opposing counsel to be present at the interview.

MR. THURMAN: I wish it had worked both ways.

JUDGE BARNES: It could have.

I suppose your witnesses didn't require your presence.

MR. THURMAN: I have been told in prior cases that we cannot tell our witnesses that we want to be present.

JUDGE BARNES: You can ask me and I can enter a ruling.

MR. THUEMAN: That is water over the dam now. It is a little late for me to ask you now.

I was going on past experience.

JUDGE BARNES: Mr. Topkis, are there any studies that these witnesses will be referring to?

MR. TOPKIS: Just one, your Honor, complaint counsel already havve a copy of it.

It is a study that Arthur D. Little made on behalf of U. S. Steel with respect to its entry into the indnstrial gases market in 1968 and '69.

MR. THURMAN: I don't know how a so-called expert will get up there and talk about studies he has made in the past without us having seen the study.

JUDGE BARNES: We will cross the bridge when we come to it.

MR. THURMAN: The study that we got has nothing to do with the witnesses that he is calling.

JUDGE BARNES: Are we ready to call a witness now?

MR. TOPKIS: We are, your Honor.

With respect to -- we would call Mr. Leslie Smith.

MR. THURMANL Your Honor, befose this witness testifies, compalint counsel requests that the parties, even though this is a public hearing, the parties in

this room be identified and then witnesses who are to be called and testify in this case be sequestered and not see transcripts of the testimony of the witness.

JUDGE BARNES: Mr.Laister has been here all long. IIdon't suppose you are including him.

MR. THURMAN: Yes. He is the clean-up man, especially him.

JUDGE BARNES: Mr. Doan--

MR. WOLLEN: Mr. Doan and Mr. Giordano are here, the president and chairman of the board are here, they were here during the hearings in Washington also.

MR. THURMAN: It is a different ballgame now.

They were here to consult counsel when we had our witness on.

Counsel said that th ey needed to be there present to advise them --

JUDGE BARNES: I am merely going to require that the witnesses identify themselves.

MR. TOPKIS: Well, your Honor, going around the room, Mr. Laister, Mr. Giordano, Mr. Perham, the lady I do not know, Mr. Dow, Mr. Doan, Mr. Flamm are known to your Honor and that is it.

JUDGE BARNES: The record shows them present and I will permit them to remain in the courtroom.

MR. THURMAN: We take exception to your Honor's

rule.

JUDGE BARNES: These are the principal operating officers of the companies named as respondents and I don't believe their presence will influence their testimony.

MR. THURMAN: The principal officers probably won't be testifying to represent the corporation.

I think the corporation -- I repeat this again, which I stated throughout this case, they are allowed one representative.

Here we have five or six witnesses here to sit in and listen and fill in and coordinate their testimony.

In my opinion this is not fair in the trying ofa case.

JUDGE BARNES: I am going to permit them to remain.

The record will show they are present during the witness' testimony.

LESLIE EDWARD SMITH,

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TOPKIS:

Q Mr. Smith, you are chairman of the board of

British Oxygen Company, Ltd. -- what is the correct name of it?

A The British Oxygen Company Limitdd.

Q According to my notes you were born in 1918 in London?

A 1919.

Q Your schooling, please, sir.

A Ordinary elementary school up until the age of ten. I then went to public school in Britain which, I believe, in American it is a private school, but it is a public school inBritain called Christ Hospital.

I left there when I was 17 when I went to work.

Q Did you have any university training?

A I did not.

Q In what field did you go to work?

A I went into a firm of chartered accountants.

The American equivalent is a CPA, as an article clerk.

In other words, take articles to learn to become a chartered accountant.

Q How long did you stay with that firm, sir?

A I was with them for three years when the war broke out and I joined the Army.

Q How long were you in the Army?

A Eight year.

Q Where did you serve?

A North Africa and Italy.

Q You went in as an enlisted man?

A Yes.

Q You were subsequently commissioned?

A Yes.

Q With what rank were you mustered out?

A As a captain.

Q In 1946?

A 1946.

Q What did you do then, sir?

A I guess it is fair to describe it as messing around for two or three years when I tried to find out what I wanted todo.

Q A lot of us were doing that at that time.

Will you tell us -- what those --

A What I decided to do was to return to the accounting profession and finish my qualifications.

Q Were you finally chartered?

A Yes.

Q In what year?

A In 1950 or '51.

Q And you went to work or practiced with a farm of chartered accountants?

A Yes.

Q For how long?

A For some three years.

Q What did you do then, sir?

A I then joined BOC in 1956.

Q In what capacity?

A As a junior accountant.

Q What were your responsibilities?

A The usual bookkeeping responsibilities at the head office of the corporation -- home office of the corporation.

Q What was the next development of significance in your career?

A In 1958 I became the group accountant and my job then was to consolidate the group figures that came in from different parts of the world.

In 1960 I became the chief executive finance, which was not at that time -- which didn't carry at that time membership on the board of BOC but it was the usual top financial duties of the corporation.

In 1962 I joined the Board as its finance director.

I hope wouldn't -- I won't be tied precisely to these dates.

QNobody will be able to prove you wrong so we are free.

A In 1964 I became commercial director.

And the arrangement at that time was a triumvirate,

a three-man rule with the managing director having two assistants, one on the commercial side and one on the technical side and I was the commercial man.

The managing director in those days retired for ill health and was succeeded by another man as director who held the office for a few months when he died and what emerged in 1966 was the joint managing directors, one of whom was Dr. Nickel Gross and the other one was myself.

That continued until Nickel Gross' death, again, from memory, in 1969, when I assumed sole responsibility as group managing director.

I finally succeeded to the chairmanship in March of 1972 upon the retirement of our previous chairman, Mr. J. S. Hutchison.

Q You have held the chairmanship since that time?

A Yes.

Q Now, just so that our record may be complete, sir, I gather BOC is a corporation chartered under British law?

A Yes.

Q It has public shareholders?

A Yes.

Q About how many?

A 90,000.

Q And it has a board of directors?

A Yes.

Q How was the board of directors chosen?

A It is chosen in the first place as soon as a gap appears. It is chosen by discussion amongst the existing members as to how the gap should be filled and quite clearly, whether it is to be filled by an executive director or non-executive director makes some differences to the form of discussion.

Finally, some sort of consent is reached and the individual either is nominated, if it is -- he is either nominated or if he is a non-executive director.

The balance on the BOC board is roughly 50-50. In other words, about 50 per cent nonexecutive and 50 per cent executive.

Q When you say non-executive, you mean people who are outside of BOC?

A Yes.

Q Are the directors thus selected, ratified by the shareholders?

A They are indeed, at the next general meeting.

Q Are your directors paid?

A Yes.

Q Honorary or --

A $2,500 pounds a year.

Q Does the board of directors have the responsibility of directing the affairs of the company in toto?

A Yes.

Q And you have spoken of yourself and others as having had the position of managing director.

What is the function of the managing director or directors?

A He is primarily charged with the responsibility of day to day management decisions, working to direction of strategy imposed upon him by his board.

Q Would it be accurate to describe the managing director as the chief executive officer of the company?

A Yes, although perhaps I ought to expand a little.

There have been occasions in the past when BOC had had more than one managing director.

Q Today you are chairman and you also have chief executive responsibility?

A That is correct, yes.

Q Are there any managing directors today other than yourself?

A Not so far as the parent board is concerned, no.

Q And by the parent, you mean BOC?

A That is right.

Q Now, BOC has subsidiaries dotted at various places around the world?

A Yes.

Q About how many companies, sir?

A I think at the latest count it was about 40.

Q Is there any particular organizing principle that has dictated where those companies should operate?

A Where they should operate, no.

I think it would be true to say that this is a mixture of planning and accident.

I think that is the true experience of most companies.

Q So far as planning or accident is concerned, I gather from looking at various exhibits in evidence that BOC is particularly active in areas which formerly gloried the title the British Empire?

A That is true.

MR. THURMAN: Your Honor, Objection.

Mr. Topkis has obviously gone from cross to direct examination.

He is starting in the substance now. I didn'tobject on the qualifications. I let him lead.

Now, we ought to get the testimony from the witness instead of Mr. Topkis.

MR. TOPKIS: I was leading, of course, in the interest of economy of time.

JUDGE BARNES: All right.

Q You referred to the BOC group earlier.

Will you tell us what that is, sir?

A Yes.

It is -- it consists of the parent company, the British company which has branches, subsidiaries throughout the world, all having, for the most part, a common interest in a common market and having a common purpose.

Q Does the group then -- the term "the group" mean the parent company and all its related companies around the world?

A Yes, indeed.

Q I see.

JUDGE BARNES: Are these branches and subsidiaries all totally owned by BOC?

THE WITNESS: No, they are not.

In many cases as a matter of policy, there is a large minority interest.

Q Would you describe to us, please, that policy?

A Yes, I would be pleased to.

I think the policy that we have adopted in group organization owes its form to a number of elements.

Perhaps the most important is thenature of the business in which we are.

The industrial gas business is such that it is not easily exportable.

You cannot transport quantities of industrial

gas over any great distance and very rarely across national boundaries.

It means, therefore, that in the course of building up the group over the last 70 years, the natural direction for that development is the export of capital and the export of technology, so that theplant and the company can be established in that overseas territory and complete in itself.

Now, we have taken the view that all those companies, partly because of the nature of the business, should be as closely identified with the local political, the economic and social scene, as possible.

Now, I know only too well that all multi-national companies will claim to be good citizens in the countries in which they operate and in my experience, most of them, indeed, are.

The fact is that we try to add to the situation, behaving as good citizens, by adding one or two features that may not be so common.

The first is to delegate the maximum amount of possible management authority to that local company and to equip that company with its own local board of directors, again, most of which are non-exedutive directors and therefore not paid by the company, who will provide guidance to the management and to whom the local management

will report, and thirdly, to provide, as soon as the time is appropriate, which is usually a matter of the record of the local company, the size of it and so on, wherever it is appropriate, to put a percentage of the equity into the hands of the local nationals.

In the case of our larger overseas companies, we don't hold more than 60 per cent, that is a matter of deliberate policy.

We think, by these steps, it reduces the element of control from London, very substnatially, we think it is in the best interests of the group and in the best interests of the operating companies in these overseas areas.

Q What areas of responsibility remain in London, then, sir, so far as these foreign members of the group are concerned?

A The main responsibility resting back in London is the over-all supervision of group resources.

Let me put that simpler. Most of the emphasis lies in finance.

To insure that there is a financial policy which allows the overseas companies, the operating companies, I prefer tocall them, to develop at maximum rate and yet not claim too much of the total group resources available.

The other area, of course, is in top

management of the company, another resource for which there has to be some over-all group control would be the wrong word, supervision.

Q I am going to show you a couple of exhibits, Mr. Smith, BOCR Exhibit 222 and BOCR Exhibit 223, and I will ask you, sir, to tell us what they are?

A RX-222 is the circular letter which the managing director in charge of overseas companies, Mr. Hesketh-Jones, which I approved, was sent out to our overseas companies in February of '73 which attempts to set out the relationship, the guts of the relationship between London and the overseas companies and sets out in particular those areas --

MR. THURMAN: Objection, your Honor.

The document speaks for itself.

Just identify it.

JUDGE BARNES: Well, I think his testimony is proper so far.

You may continue, Mr. Smith.

A -- sets out in particular those areas where the overseas companies are required to consult with London.

223,which again was composed by our overseas managing director, Mr. Hesketh-Jones -- it is a paper which was sent out giving our rules of what the role of

the overseas board should be for each of the overseas companies having their own boards.

MR. TOPKIS: I offer them in evidence.

JUDGE BARNES: I have one question about them.

There is a typewritten note at the top of each exhibit as to when it was sent overseas.

It looks like it is not part of the regular exhibit.

MR. TOPKIS: It is not, your Honor. I was put on there for our purposes.

I was going to explain that.

JUDGE BARNES: Do you want that in?

MR. TOPKIS: No, I would strike that. Although the witness testified that these documents were distributed to the overseas comapnies.

THE WITNESS: Yes.

JUDGE BARNES: There is a date at the bottom of it, which I take it would be more appropriate.

MR. TOPKIS: Right. I think that is in fact the date that was used.

JUDGE BARNES: We will strike the typewritten sentences at the top.

Do you have any objection?

MR. THURMAN: We are unprepared to make any objection.

Mr. Topkis has fallen into the trap where he criticized complai counsel for not properly preparing.

We submit right back that Mr. Topkis and Mr. Kaplan are not properly prepared.

They hand us a bunch of documents right at this moment which they want introduced which we haven't had a chance to look at.

No. 2, Mr. Topkis' misinterpretation of the rules of evidence, w ch he has completely misi erpreted, but, for purposes of this trial, since we were prohibited form going into this, on our part of the case we will buy his interpretation.

This gentelman is testifying to this. The document speaks for itself.

Don't waste this court's time with testimony from a witness.

Let's put the document in. That is the best evidence. He is going about it in the reverse now. He lets the man talk for 15 minutes then he says, hey, look, we have documents explaining that.

We will object on relevancy. I have been caught blindly on this.

If the case was so well prepared, why wasn't

this given days ago.

We have been criticized by your Honor as to how many days we have taken.

They said they prepared well before we did. Here they come in with a bunch of documents.

In essence, they are saying, hey, we were kidding you before, we weren't really prepared.

JUDGE BARNES: How many exhibits are we going to have in this category?

MR. TOPKIS: Very few, your Honor, a handful.

The only reason --

MR. THURMAN: I show your Honor what a handful is.

This little company --

MR. TOPKIS: They are annual reports of the companies, your Honor.

MR. THURMAN: They --

MR. TOPKIS: We have supplied complaint counsel with 95 per cent of the documents we are going to be offering.

As a result of development of complaint counsel's case as always happens, a few documents came to us which we thought appropriate to our case.

We have supplied copies of them to complaint counsel.

I have no objection to the deferring of consideration of these documents until they have had ample time to review them.

JUDGE BARNES: We will defer ruling on them until they have had time to review them.

MR. THURMAN: I submit the other objection to start with, the other man testified about it, what good is this?

JUDGE BARNES: Mr. Smith has testified generally what the document represents.

He hasn't stated what the document said, I can read that.

He told us in a general way what the document purports to be or what it purports to represent and I will permit the testimony to stand.

MR. THURMAN: We were not permitted to ask a witness questions where a document was concerned.

Mr. Topkis has said the best evidence --

JUDGE BARNES: He hasn't stated -- he hasn't tried to contradict what this document says.

He asekd him to describe it generally.

MR. THURMAN: We weren't even allowed that much, your Honor.

JUDGE BARNES: I am not going to accept that, Mr. Thurman.

BY MR. TOPKIS:

Q Mr. Smith, there is reference in some of the exhibits that have been received to an entity known as BOC International.

Would you tell us what BOC International is?

A BOC International is a body which is composed of myself as chairman, the UK managing directors as they were last year and the overseas management director, Mr. Hesketh-Jones, plus the directors of the four overseas companies, the South African Company, Australian Company, Indian Company, and the Canadian Company, who meet twice a year to talk.

It is not an executive body of any kind. It is there to discuss group development, group policies and to discuss and exchange views on experiences and how things are going and how they should go.

I must emphasize that it has no executive power at all and any conclusion which that body reaches requires subsequent executive approval either from the BOC board or wherever it is relevant.

Q That brings to mind a question about your decision-making process.

When an overseas member of the group wants to do something, how does it decide what things that overseas member can do on its own andwhat it has to check

back with London on?

A I will start answering by saying that as far as authorization of expenditures is concerned, there are two areas where consultation and agreement with London is essential.

The first is if any overseas company wants to start business in a new geographical area, a new country, and if they want to start business in a new product, that is the second one.

Outside of those two, the levens of authorized expenditure are generous in that if it is ordinary expenditure with respect to existing business, the original approval of the budget for that country goes nine-tenths of the way for getting total approval irrespective of the sum of money.

Now, what happens on those occasions when approval is required is that the management of the overseas company puts its proposals together and first requires to get the approval and consent of its local board of directors and the normal custom is for a copy of that proposal from management at the time it goes to the local board to be sent to our overseas managing director in London and it depends very much upon the significance of the investmentproposal but London wouldn't look at it until it has first received the approval of the local

board.

Subsequently, there will be discussion between London and in particular, through the managing director of overseas and the company concerned, in order that we have a full understanding of what is proposed and the final approval is given by the BOC board itself, when the overseas managing director takes the proposal on behalf of the overseas company to the BOC board who alone can give approval in those two particular areas, starging in a new country or new products.

Q Would that procedure apply to any proposed acquisition by an overseas company?

A Certainly it would.

Q There has been received in evidence, I believe, as Commission Exhibit 292, the annual report of BOC for 1973, the year ending September 1973, if I may furnish a copy toyour Honor and to you, Mr. Smith, and I would like you, Mr. Smith, to run through the annual report with me.

Let me first ask you, this annual report is dated September 1973.

Does it, however, in fact, sir, record the status of BOC as it stood in November of 1973?

MR. THURMAN: Objection.

The annual report speaks for itself.

JUDGE BARNES: Well, I don't know whether it does or not.

We would have to find out --

MR. THURMAN: He is leading in the first place. It is leading.

S-econdly, it speaks for itself.

Any self-serving remarks can only be expanded by more self-serving testimony here.

You can't expand upon --

JUDGE BARNES: Mr. Thurman, just make your objection succinctly so I can rule on it.

I dno't need a lot of comments. I need an objection that I can rule on.

What is your objection?

MR. THURMAN: I was just following Mr. Topkis' lead.

I'd better go over to my style and make a concise objection.

JUDGE BARNES: Let's have them then from now on. It is easier on me, for mysake.

MR. THURMAN: I wish this had started quite awhile back.

Objection number one, to his leading question and objection number two is that it speaks for itself.

They are self-serving statements that can be

hold against complaint counsel but not in their favor then they try to expand upon more self-serving statements.

JUDGE BARNES: I will sustain the objection on it being a leading question.

Mr. Topkis, can you rephrease it?

BY MR. TOPKIS:

Q Mr. Smith, were there any significant changes in BOC operations or circumstances from the end of September of 1973 and the end of November 1973?

A No.

Q Now, I see --

MR. THURMAN: What was the answer?

JUDGE BARNES: The answer was no.

Q I see on page F, it is marked, but let me show it to you, there is a page headed the BritishOXygen Company Limited.

A Yes.

Q And on that page there appears --

A It is page 4.

Q -- an indication that there are three managing directors, Mr. Hesketh-Jones, Mr. Laister, and Mr. Williams.

You earlier testified that as of today there are no managing directors.

Could you offer any enlightenment to that

seeming discrepancy?

A Yes, indeed.

There have been a number of changes, in fact, in the top organiz ation of the BOC group, since, in fact, January 1, 1974.

Q All right. That is all I needed. Thank you, sir.

Now, going on to -- it is page 8, I believe, it is headed "Report of the directors continued," I see that that refers to a gases division.

Will you tell us, please, what is the gases division of BOC?

A It is a segment of the UK business which, for convenience, we have described as the gases division. It handles the industrial gas business we have in the UK.

Q There are various other divisions listed on the next couple of pages, welding products division, advanced engineering, Medishield, metals division, chemicals division.

What are they, sir?

A Similar convenient sectionsof the business, split in that way for management convenience purposes.

Q And this is all UK business?

A Yes.

Q Is that true also of Medishield, referred to on page 9?

A Medishield is a new organization which has been set up to pull together the medical equipment business that we have throughout the world.

We are in the medical equipment business in most places in which we operate and the purpose of Medishidld is simply to pull them together under some form of central management direction.

In other words, on an international basis, rather than on the UK and overseas business that this report refers to mostly.

JUDGE BARNES: Medishield handled a little differently than your other operations?

THE WITNESS: It is handled from a central point, internationally.

Q And then over on page 10, I believe it is, the key word is "consumer products division."

A Yes.

Q That division, is that a UK division also?

A Yes.

Q Incidentally, when we speak of UK, does thatmean only the United Kingdom or does it include other areas?

A We include in the UK the bits of business thatwe have in Western Europe but that is as far as it goes.

Q And Scandinavia?

A I would include Scandinavia in Western Europe.

Q And then the report continues, referring to overseas companies.

Those are all the group companies that we have referred to before.

A Yes.

Q I see thatyou have a reference here at thebottom of the next page to a joint venture with a Japanese company, NipponSanso.

Could you tell us what that is, sir?

A I am looking for the reference.

MR. TOPKIS: If I may approach the witness, your Honor?

JUDGEBARNES: The bottom of page 11.

A This is a very small joint venture company that we formed in Japan, half being owned by Nippon Sanso and the other half by Edwards High Vacuum Company, which is an attempt to market some of our vacuum equipment in Japan.

Q Now, does British Oxygen have any facilities for the manufacture of air separation plants?

A Yes.

Q And you know what I mean by air separation plants?

A Yes.

Q It is a term familiar to you?

A Yes.

Q What is it, just so there is no misunderstanding?

A It is a paint designed, around a process, for the purpose of producing the breakdown of the air into its component parts and those parts which we use, for the most part, in our industry, are, of course, oxygen, nitrogen and argon.

There are other elements much rarer on a much more -- they are more difficult to obtain for which there is a small market.

Q Referring to those manufacturing facilities, BOC has facilities for constructing such plants?

A Yes, sir.

Q Where are they, sir?

A At a place called Edmonton, which is north of London.

Q Where do you sell the plants that are manufactured in Edmonton?

A All over the world.

Q And how do you sell them?

MR. THURMAN: Objection. Remevancy.

Air separation plants is no part of this case.

MR. TOPKIS: I will be delighted to acknowledge that.

That is something else having gone down the drain.

MR. THURMAN: I didn't plead anything about

sales of air separation plants.

JUDGE BARNES: I will permit you to answer the question, Mr. Smith.

THE WITNESS: Could I have the question repeated, please?

MR. TOPKIS: May I rephrase it, your Honor?

JUDGE BARNES: All right.

Q How do you sell these air separation plants?

A Through a sales force and usually with the assistance of the overseas company, if it happens to be in the area in which the demand arises.

Q To whom are they sold?

A Well, they are sold either directly to a steel maker or a chemicals maker who requires a lot of oxygen or they are sold to an industrial gas company who, itself, will produce the gas and then sell it on to the steel maker or the chemicals maker.

Q Are you familiar with the term turnkey deal?

A Yes.

Q What does it mean?

A The total over-all project, contract, if you like.

Q You mean you build the plant and turn the key over to the owner?

A That's right.

Q That is one way that you sell such plants?

A Yes, indeed.

Q Do you also manufacture them under other arrangement?

A Well, as I said, we do -- they are either sold direct to the man who consumes oxygen or they are sold to a company who provides the service of providing the oxygen to the final consumer.

If I may give an example of that?

We sell oxygen plants to our Australian company who buys the plant from Edmonton, sets up the operation and puts oxygen down a pipeline to a steel works.

Q So sometimesyou will be selling to someone who will supply oxygen, is that right?

A Yes.

Q Is there a trade term for that type of arrangement?

A Quite a number, actually.

I am trying to find one which -- let me zero in a little bit.

Q The term supply scheme --

A Yes, that is a term certainly used in the UK.

Whether it is used in Norht America, I amnot sure, but it is used in the UK.

Q What do you mean by a supply scheme as you use the term?

A It is a contract with a company. A company such as ourselves, an industrial gas company enters into a contract

with a steel maker or a chemicals maker for the supply of, usually, a very large quantity of oxygen or possibly nitrogen, down a pipeline and usualy it is a ten or twelve or fifteen-year contract.

It is a long-term contract.

Q And when you entered into such a contract, when the supplier with the supply scheme entered into such a contract, what would you do, goahead and build the plant, or what?

A You mean, having sort of one a tender fora supply of gas?

Q Yes.

A Yes, we would build theplant, put it down and hope to turn on the top and have the gas flow down the steel works, the ultimate customer.

Q Typically, how do the steel and chemical companies who are either purchasing plants or seeking supply schemes go about getting in touch with you or the other supplies?

MR. THURMAN: Objection to the form of the question.

JUDGE BARNES: The word "typically"?

MR. THURMAN: Typically and where. Is that Australia now?

He said they sold their own company in

Australia.

I don't consider that a sale, myself, but what are they talking about?

JUDGE BARNES: Your objection is sound.

Could you rephrease the question?

MR. TOPKIS: Surely.

BY MR. TOPKIS;

Q Is there any relatively uniform pattern whereby steel companies, let us say, around the world, obtained bids or offers to supply tonnage plants?

MR. THURMAN: Objection. No foundation.

Are we talking about a market in this complaint?

This man is a finance man --

JUDGE BARNES: I think the man, chairman of BOC is probably familiar with this.

MR. THURMAN: He never told us that he has ever sold a steel company or a chemical company or that he has ever visited one in the United States.

Certainly we have to have a little foundation here as to what he is basing his testimony on.

JUDGE BARNES: Let's have a foundation question.

Q Mr. Smith, have you ever negotiated a sale of an air separation plant?

A Yes.

Q Many times?

MR. THURMAN: It is leading.

Q How many times?

A I have been involved in probably 25 negotiations.

Q Any of them steel companies?

A Most of them.

Q Any of them chemical companies?

A Yes, a few.

Q Now, sir, can you tell us, is there any particular pattern whereby steel and chemical companies --

MR. THURMAN: Objection.

JUDGE BARNES: Let him finish his question.

MR. THURMAN: I might want to hel p him in asking it.

MR. TOPKIS: I am getting along pretty well.

Q Is there any pattern whereby steel or chemical companies solicit tenders whereby --

A Yes.

MR. THURMAN: Objection.

Don't answer until I object.

Where are we talking about?

MR. TOPKSI: Around the world.

MR. THURMAN: Are you talking about the United States?

JUDGE BARNES: It is still part of the world.

MR. THURMAN: There has been no basis for him to

testify that he knows how steel companies operate in the United States.

JUDGE BARNES: He said he has been involved in at least 25 negotiations and I think he can answer this question.

MR. THURMAN: Your Honor, if you would permit me, I would submit that steel companies in Japan may operate one way.

He hasn't tied it in that he operates in the same fashion.

JUDGE BARNES: He is then to answer the question and tell us if there is a typical way and tell us if in Japan they do it in one way and in Australia in another way.

MR. THURMAN: He may operate 25 contracts with a steel company in Britian, the United Kingdom. I don't know this.

JUDGE BARNES: I don't know but I hope he will tell us.

Answer the question.

THE WITNESS: I have forgotten the question.

Can you read it?

MR. TOPKIS: I will rephrase it.

JUDGE BARNES: Let's see if the reporter is getting it down.

(Question read.)

Q Mr. Smith, typically, is there any pattern whereby steel and chemical companies around the world seek tenders of construction or supply of plants?

A Yes, sir.

Q Would you describe that pattern?

MR. THURMAN: Objection.

We would prefer that if they are typical, that he explain that.

MR. TOPKIS: We will bring that out.

JUDGE BARNES: You may answer.

A. The pattern is composed of the fact that there are a number of small companies who are makers of air separation plants and in fact, upon any tender, the same number of numbers, the same names of companies always appear.

Q Who are these companies who have the capacity to build air separation plants?

A The American companies are Union Carbide & Air Products, BOC is the British company, L'Air Liquide is the French company and they have facilities in Canada and in Germany, the Linde AG Company has that facility.

One should add that there are three Japanese companies also who can build air separation plants but -- no, let me leave it at that, the answer to your question.

Q How is it that steel companies or chemical companies,

typically, seek bids from these companies which can build air separation plants?

MR. THURMAN: Objection, your Honor, until we get to -- who are we talking about? What companies, where?

MR. TOPKIS: I will develop that.

MR. THURMAN: I think he ought to put the horse before the cart.

He will develop first what he wants to put in the record and then he is going to develop what the man is qualified.

JUDGE BARNES: I think the witness is competent to answer.

How do steel and chemical companies go about soliciting offers?

THE WITNESS: It is normaly by written inquiry.

Q And typically, is the inquiry limited to one supplier or do you find that you are bidding against other suppliers?

MR. THURMAN: Objection, leading.

About as far as you can lead.

JUDGE BARNES: It is not a leading question. You may answer the question.

A The inquirey would normally go to everybody capable of building the plant and supplying the requirements of the steel works and chemical works.

MR. THURMAN: Your Honor, I don't want to take issue with you but the question would be who does this go to. Thatis a very direct question.

But not, does it typically go to --

JUDGE BARNES: He said one or many.

I don't think that is leading.

MR. THURMAN: Why can't he ask a direct question?

Q Sir, you have described for us the ways in which bids to construct air separation plants are typically sent out by steel and chemical companies.

Would you describe for us the way in which such companies or any other seekers of supply schemes seek such schemes?

A Yes.

They will frequently go to the industrial gas companies who operate in their own territory or country and seek the supply from them.

This is probably the more usual form.

JUDGE BARNES: This would be a good point to break for lunch.

(Luncheon recess taken at 12:30 p.m.)

AFTERNOON SESSION

Whereupon at 2:00 o'clock the hearing resumed.

JUDGE BARNES: You may proceed.

MR. TOPKIS: Your Honor, I have conferred with my frient, Mr. Thurman and he tells me that I may now offer 222 and 223, that is, he has now had an opportunity to consider them and I do offer them.

JUDGE BARNES: Any objections?

MR. THURMAN: I would like voir dire.

JUDGE BARNES: Yes.

VOIR DIRE EXAMINATION

BY MR. THURMAN:

Q Mr. Smith, did you approve these documents?

A Yes.

Q Is there any indication of your approval or when did you approve them?

A Well, they will have been approved bafore they were dispatched to the operating companies.

Q Do you know when they were dispatched?

A Very soon after the date that the circulars were prepared.

Q I can't hear you.

A They were dispatched very soon after the dates on which the circulars were prepared.

Q Do you call September of '72 and February of '73

very soon after, do you call that very soon?

A May I just consult the documents first?

Q Yes.

A The first one is dated July, 1972 and the second one is September of '72. The September of '72 one, there was some delay in having them dispatched because, in fact, what we did was to have the document dispatched at our BOC International meeting. This, as you will recall, was the forum of discussion which we have and it is a platform on which both the U.K. top executives and the overseas directors of the companies can discuss matters of group interest and these, of course, are matters of group interest.

I would suspect that the delay that took place was that we wanted them discussed at BOC International before it was sent out.

Q One was sent out the same day. Was that discussed before the Board?

A Let me see which one.

MR. TOPKIS: I am not sure I understand the basis of Mr. Thurman's suggestion that one was sent out the same day.

MR. THURMAN: Well, it was dated back on -- there is no number on it but the third page was dated, supposedly by the author on July 21, 1972. There was a

notation and I don't know where the notations come from but it says "send out to the overseas company on 21, July, 1972."

MR. TOPKIS: We said we added those notations and they have been deleted from the documents.

MR. THURMAN: Why?

MR. TOPKIS: They were added by us and not part of the original documents.

MR. THURMAN: We don't mind if you add them as long as it is fact.

BY MR. THURMAN:

Q Was this sent out the same day? Did the Board consider it?

Why would one go out the same day and --

A I don't recall the exact circumstances under which they were dispatched in 1972. But, they were dispatched, no doubt.

Q All papers going to the British Overseas Companies were brought before the Board?

A Not all papers, by any means.

Q Why would these particular papers be brought before the Board?

A I think it is a matter of relative importance. If it is a matter of telling the overseas companies what we expect to be consulted on, that is amatter of sufficient

importance that will require the BOC Board listening.

Q Do you have any Board minutes in which you discussed these?

A I can't recollect.

Q Is your approval indicated anywhere on these documents?

A Is my approval?

Q Yes.

A Well, all I can tell you is that they would not have gone out without my approval. That I am quite sure of.

Q What form of approval do you give it, then?

A Well, Mr. Hesketh Jones office is right next to mine and it would have been a matter of discussion, probably over a number of weeks, before they reached their final form.

Q Do you have any regulation or policy or something as to what documents come up for your approval before it goes out and what doesn't come before you for your approval?

A There is no written instructions. But, over the course of years, general experience and understanding, I am sure, it is quite clear in what I am interested in and what I am not interested in. By and large, things that are important generally in terms of group interest are things that I would want to see and approve.

Q You are absolutely sure that you saw these documents --

A I am quite certain of it.

Q Has there been any other document since that time?

JUDGE BARNES: This is going beyond voir dire now. We are going into cross-examination now.

MR. THURMAN: I have two objections, Your Honor.

I think that there have been minutes, these were considered by the Board and we would like the minutes to see what consideration was given. Number two, we have an objection on the grounds of relevancy. I think Mr. Topkis ought to indicate the relevancy of these documents and how it relates to this case.

JUDGE BARNES: Well, we could use a relevancy explanation, Mr. Topkis.

MR. TOPKIS: Certainly, Your Honor.

There are really two elements of relevance.

First: I think when Your Honor is considering the question of the significance of an acquisition stock interest by BOC in Airco, I think Your Honor will be given guidance by the formal definition of how BOC works with and relates to companies abroad in which it has an interest.

Secondly, most specifically, there has been testimony here that one underling or another in one company or another had one conversation or another about a possible acquisition or something like that and I wanted Your Honor

to know the precise mechanics by which acquisitions are considered by the BOC group.

MR. THURMAN: If this is relevant, why was it not submitted under subpoena?

MR. TOPKIS: Not everything that was relevant was submitted under subpoena. Only the documents called for.

MR. THURMAN: We asked for documents relating to acquisitions and I think if control was part of it, this should have been considered.

JUDGE BARNES: I don't think they were necessarily related to any specific acquisition. These are general company documents.

I will overrule your objection and receive --

MR. THURMAN: If it is not voir dire, perhaps Your Honor will correct me and then I can bring it up on cross but I would like to know who these were sent to, what companies.

THE WITNESS: May I answer that?

JUDGE BARNES: Yes.

THE WITNESS: They were sent to all our non-UK overseas companies.

MR. THURMAN: I wold like to know, specifically, maybe it is a cross-examination question but I would like to know specifically who "all" means.

JUDGE BARNES: I think you can take the list of subsidiaries and all those not in the UK they were sent to. If you want to ask him about a specific one, perhaps you ought to reserve that for cross-examination.

I will receive --

MR. THURMAN: Another thing is, it is not properly marked. I don't know if that is my problem or not. It might be Mr. Topkis' problem.

JUDGE BARNES: I believe the BOC stands for British Oxygen and if Airco submits exhibits, I suppose they will call them Airco or will you use different numbers?

MR. TOPKIS: Our's are BOCRX followed by a number and Airco's are --

MR. WOLLEN: RAX.

MR. THURMAN: I guess it is my responsibility to see that these follow commission rules. It should be A, B, C and D.

JUDGE BARNES: Yes. It should be that way.

MR. TOPKIS: Your Honor, I apologize. I asked that the rule be checked and I won't point an accusing finger but I was told that it wasn't required under the rules. If it is required, we will do it, Your Honor.

JUDGE BARNES: Thank you.

MR. THURMAN: I wish you would point a finger

at who told you this. Certainly, I didn't tell it to you.

MR. TOPKIS: I didn't mean to suggest that. I just didn't mean to differentiate among my colleagues, not my adversaries.

JUDGE BARNES: I will receive BOC Exhibits RX222 A through C and 223 A through D in evidence.

(BOC Exhibits RX222 A through C and 223-A thru D were received in evidence.)

BY MR. TOPKIS:

Q Mr. Smith, going back to where we were just prior to the luncheon recess, sir, we were talking, you will recall, about BOC's manufacturing and selling air separation plants and I think you told us that you sell them to steel and chemical companies for their own use; right?

A Right.

Q Do you sell them to any other customers?

A We certainly sell them to industrial gas companies who would use them for the purpose of basing a supply scheme.

Q And occasionally for resale?

A Resale, very occasionally.

If we were using any of our associate companies, yes.

Q So, when one of your associate companies manages to negotiate the sale of an air separation plant, you will sell the plant to the associate company and the company

will resell it; right?

A That frequently happens, yes.

Q But, when you are dealing with a company which is not an associated company, what happens?

A We are talking about selling to another industrial gas company?

Q Right, sir.

MR. THURMAN: Objection, Your Honor. He is leading --

MR. TOPKIS: I will withdraw the question, Mr. Thurman.

Q Do I gather from what you just said, sir, when you sell to other non-affiliated gas companies, it is for a supply scheme?

A Yes.

MR. THURMAN: Objection. He is leading the witness. There is no foundation --

MR. TOPKIS: I will develop it.

Q Do you, on occasion, sell to industrial gas companies?

A Yes, we do.

MR. THURMAN: Are you finished?

Q Do you --

MR. THURMAN: Wait a minute.

JUDGE BARNES: What is your objection now?

MR. THURMAN: He didn't let the man finish. He said he sells to related companies.

JUDGE BARNES: He said earlier that he sells to other industrial gas companies. I recall his testimony specifically. He said he did and usually for a supply arrangement of some sort.

You may proceed.

BY MR. TOPKIS:

Q Now, Mr. Smith, speaking of direct sales to other purchasers other than industrial gas companies, you have mentioned steel companies and chemical companies; do you sell to other industrial users?

A The only other type of customer that I can think of, at the large end of the business, tonnage-wise, would be glass manufacturers who buy large scale plants for the sale of nitrogen in the floating glass process. I can't bring any others to mind.

Q When you speak of chemical companies, you include petrol chemical companies?

A Not in the form of large plants. It could be smaller plants.

Q So, you sell smaller plants also?

A Yes.

Q How do you differentiate between the two?

A It is largely a matter of convenience. For the most

purposes, we consider anything larger than 50 tons a day production as being tonnage, although, infact, in these days, a hundred tons and above is more likely to be required. Anything less than 50 tons a day, we would regard as a small plant.

Q And do you sell these small plants the same way that you sell the large plants that you have been discussing, or differently?

A No. No basic difference. No basic difference.

Q Do you have the same competitors in the sale of these small plants that you have in the sale of larger plants?

A No, they are quite different.

Q Who are the competitors in the smaller end of the business?

A There are a considerable number around the world.

The people that we come up against most frequently are Superior Products in this country, Petrocarbon in the UK. Those are the two that most easily come to mind.

Q Now, going back to the larger end of the business, when you ar dealing with steel and chemical companies, you have testified, I believe, and correct me if I am wrong, that sometimes they go to turnkey purchase and other times they are interested in supply schemes?

A That's right.

Q In your negotiations with such companies, sir, could

you tell his Honor what your experience indicates have been the factors that go into the decision to go the supply scheme route or the turnkey route?

MR. THURMAN: Objection. Using Mr. Topkis' words, he is reading the minds of the customers.

How does he know?

MR. TOPKIS: I will take whatever is articulated to the witness.

MR. THURMAN: It is hearsay.

MR. TOPKIS: I am not offering it for the prooof of it. I am offering it for the circumstances under which the companies will go one route or the other.

MR. THURMAN: That appears to go to the truth of it. Using Mr. Topkis' other objection, use the best evidence. Call the company.

MR. TOPKIS: We will call a steel witness.

MR. THURMAN: I don't see him listed.

JUDGE BARNES: I will let Mr. Smith testify as to what his experience has told him causes a company to go one way or the other.

MR. THURMAN: My objection is a time frame, a location, a basic foundation question.

JUDGE BARNES: Let's have a time frame, anyway.

BY MR. TOPKIS:

Q In recent years in your dealings with steel and

chemical companies, will you tell us the circumstances under which they have gone way or the other way in their negotiations with you, if you can tell us of a pattern. If you can't, say you can't and that will end the matter.

MR. THURMAN: Objection. He put the time frame, "recently." I didn't ask when.

Mr. Topkis should know how to ask a question.

JUDGE BARNES: These are general questions. I will overrule your objection.

You may answer.

A Our belief is, the two main factors are, first: whether the steel company wishes to expend the capital itself or whether it wishes to have the industrial gas company supply the contract and whether the industrial gas company can supply the steel maker a better deal than he would get through buying his own plant.

Q Would you tell us the circumstances -- what effects your judgment as to the price level that you will offer as between a turnkey deal and a supply scheme?

A In our experience, the return that one can get from the capital involved in the supply contract is so influenced by the competitive situation, that is rarely more than the cost of the money involved and that the real factor, so far as we are concerned, is whether we can supplement that income by having gas available from that tonnage plant

to sell into the merchant market.

Q I see.

So, if you could have gas available to sell into the merchant market, what effect would that have on your price?

A It wouldn't have any effect on the price we charge the steel maker because that is conditioned by the competitive situation. But, it wolud have influence on as to whether we intend to bid for that supply contract or we would be looking at the overall return. In other words, the return we got both from the supply contract or from the sale of any spare supply gas in the merchant market.

Q I see.

Now, sir, I want to ask you to turn your attention back to 1968 and bring to mind, if you can, the question of the future development of BOC as matters stood then, in 1968 in the gases business and I am going to ask you in connection with that, to take a look at BOCRX57 and ask you if you can tell us what that document is?

MR. THURMAN: Your Honor, I would like to go back a minute.

I didn't realize that Mr. Topkis was going into another area. I would like answers stricken, dealing with steel companies.

Mr. Topkis keeps saying he is going to tie 1686
it up with where these companies are located and he never does. According to the record, BOC doesn't sell industrial gases in the United States. So, certainly, we can't bee talking about the relevant geography market as alleged in the complaint.

I think that certainly, for this record, this man's testifying should be tied down to what is relevant to this complaint.

JUDGE BARNES: I will deny your motion to strike the testimony.

Let's proceed, Mr. Topkis.

BY MR. TOPKIS:

Q Could you tell us, please, what BX57 is?

A Yes. Pretty well throughout 1968, what we were doing was trying to draw a deep breath and stand back from the situation and consider, totally, the direction of the group. It was something of a water shed in the development of the group.

We have been through a number of changes in organization and we had the misfortune of losing two managing directors very quickly.

It was also , incidentally, soon after the formation of BOCI --

Q BOCI?

A BOC International, which was brought into being, mainly, so we could get the general views available to us around the group and what we were saying to ourselves is that it is time we stopped and looked at the total situation to see where our future lay.

Q And what role did BOCRX57 play in that --

A This paper was, in fact, prepared, in the first place, for discussion at BOC International as a general overview of our international role.

Q I see.

And was it approved by BOC International?

A Well, BOC International, being a sort of forum, all one can say about it is that it did provide a rather satisfactory basis for discussion and that there was no dissenting voice. That this work presented a fair view as to where we should be moving, internationally.

Q Who participated, again, in BOC International?

A The three UK managing directors, plus the managing directors of the Austrailian, South African, Indian and Canadian companies and I chaired the meeting.

Q This document bears the date of May 16, 1968. Was that the time it was presented to BOC International?

A Yes, indeed.

MR. TOPKIS: I offer it in evidence, Your Honor.

JUDGE BARNES: Any objection, Mr. Thurman?

MR. THURMAN: I would like voir dire.

JUDGE BARNES: All right, proceed.

VOIR DIRE EXAMINATION

BY MR. THURMAN:

Q Mr. Smith, what was your position at that time, 1968?

A I was the group managing director.

Q What was your participation in this document?

A As chairman of BOC International, pretty well, all documents that came to BOCI came to me and were discussed with me. I had overall charge at this new look we were trying to make to the total future development of the group.

The author of it, whom, I think was Mr. Hesketh Jones-- may I refresh my memory — yes, Mr. Hesketh Jones who was the overseas managing director, we discussed this very fully before it came before BOCI for discussion.

Q I understood -- I understood first that you were not chairman and now you said --

A Group managing director.

Q I believe you stated "as chairman."

A I was chairman of BOC International, this little committee, I called it a forum. I chaired that meeting like I always have done. I chaired it in my capacity as

group managing director of BOC.

Q Was this ever approved by BOC?

A By --

Q By the BOC Board of Directors?

A I don't know. I can't remember.

Q I didn't understand your testimony. Did you say this was approved by you or that there was no objection to it?

A It was approved by me.

Q You did not go up to the Chairman of the Board as you previously testified before, the chairman of the board of BOC approved all policy matters. This is not a policy matter.

A Certain aspects of it certainly are policy matters.

Q Then what you testified earlier was not correct; is that right?

A We were talking about a different chairman.

Q But you said this was not approved by the chairman of BOC International Limited or whatever your official name is.

A Can I clarify this? Because I think there is a little bit of confusion.

Mr. Hesketh Jones and I were probably the original instigators of BOC International. BOC International is not an executive body. It is simply a talking shop made upof

representatives from both UK and overseas.

Now, in my capacity as group managing director, I chaired that talking shop. As to whether this particular paper was first approved by BOC board before I took it to BOC International, I can't remember. It may be that by searching the BOC board minutes, we may find some reference, I don't know.

What I can say for sure is that since this was a basic document to the look at the future development of the group, it was a paper which was discussed by Mr. Hesketh Jones with me and approved by me as chairman of BOC International, before it was discussed there.

Q Tell me if I am wrong, Mr. Smith.

One document you stated, a policy has to be approved not by the chairman of International but by the chairman of BOC. Now, you turn around and on the other hand you say that is not so.

A I said, since I was the chairman of BOC International, that has been the case.

MR. THURMAN: We have no objection to this going in as it exists. But, we have objection to it on the ground that this is the policy of BOC. It is inconsistent policy.

He says all the policy matters have to be approved by the Board of BOC, not International but by BOC.

There is another document which says, well, this wasn't approved by them but it was policy. There is an inconsistency there. We would admit it as a document prepared by Hesketh Jones but not for the truth of the matter.

MR. TOPKIS: I am not putting it forth as policy of BOC, Your Honor.

Just so you will know where we are going, Your Honor, there is a sequence of documents here and the story they tell is a simple one.

This is the first. This is the one that says we have problems, let's take a look at them. The ensuing documents will be the development in the taking a look at the problems. This is the first in a string.

For my present purposes, I don't quarrel with the witness when he says that it has policy content in it.

JUDGE BARNES: All right. I will receive Respondent's Exhibit RX57A through H.

(Respondent's Exhibit RX57A through H received into evidence.)

MR. TOPKIS: If I may, Your Honor, I would like to call to your attention, very brief portions of this document that we would like your Honor to consider.

MR. THURMAN: Before we get started on that, Your Honor, it speaks for itself. There is no use in

reading something from the document into the record --

JUDGE BARNES: He can call my attention to any part of the document that he thinks is relevant.

MR. TOPKIS: Just a little bit, Your Honor.

The first page, the second paragraph, the document says what BOC really is today is a British company which has over the years, started up or acquired a number of associates or subsidiaries overseas, most of which today are flourishing. All until recently, in the Commonwealth, all until Italy, English speaking. Small units in small countries, comparatively under-developed. We have been notably absent from USA, continental Europe and Japan, containing between them, over fifty percent of the world's industrial production and holding with UK, practically a monopoly of the non-communist world's advanced technology.

Over on the second page, under the heading of parameters defining BOC's scope to becoming increasingly international, we go down to the paragraph beginning examining these, the first statement of group objectives and some code that follows says, to move toward becoming a fully international company with special reference to technological achievement. We are going in starting up and building to meet market demand to all levels of sophistication in the industrial gas business. This is

at present our main strength. It is one we can still exploit in many of the less developed parts of the world where we would not be too late on the ground and also in part, at least, of continental Europe. But, we have not much to exploit in North America and Japan is doubtful.

Then going over to page 3, in the middle under the Roman numbers sub-paragraphs, thus our greatest gap is in one above and one above is what I just read. It goes on:

We have no major latent talents awaiting unexploited to take us into Japan, Europe or USA or to double our activity in Australia, South Africa or Canada.

But, the opportunities we do have now would be better identified and quantified ones the proposed steps towards the implementation of group objectives are stated.

I think that is all that I really need to call Your Honor's attention to in this rather lengthy document, for the moment.

MR. THURMAN: Well, maybe I had better make further objection on this and that is as to relevancy and the time period.

The 68 period would not be relevant at all.

JUDGE BARNES: Mr. Topkis feels it is. They go by five year plans, don't they?

MR. THURMAN: They underlined "now," and I

appreciate Mr. Toplis reading that document. I was having a little difficulty with it.

JUDGE BARNES: I think it is improper to read it into the record like that. You can just call my attention to the appropriate paragraph.

MR. TOPKIS: I am sorry, Your Honor. I apologize.

JUDGE BARNES: I believe I have already received it in evidence.

MR. TOPKIS: Right.

BY MR. TOPKIS:

Q I will next ask the witness to take a look at BOC RX60 and ask the witness to tell us what that is, please.

A Yes. This really follows from the previous document you just introduced, which was an attempt to go beyond those very broad statements of what we wanted to do and start looking, more particularly, at various parts of the world to try to get some views, form some judgments as to the attitudes we should take in various parts of the world and this particular paper which is BOC in the USA again, it was a discussion paper produced by our planning people to provide a basis for discussion, incidentally, mostly with BOC International, I had nothing to discuss with the board at this stage, as to whether views expressed here, were ones which were generally accepted as being

a fair judgment of the situation between ourselves and the American market, by the people in BOC International.

Q Was this report accepted by BOC International or rejected?

A It was accepted as a basis for discussion. It formed the basis for discussion.

Q And I notice that the document on Page 4 has an item marked "practical steps." Do you see that?

A Yes.

Q And I ask you, sir, with particular reference to the first of those practical steps, whether that was adopted?

A Yes, it was.

MR. THURMAN: Objection. We can't discuss the paper until it is in evidence.

MR. TOPKIS: I was going to offer it. I thought until I demonstrated why I wanted it, that I would be met with an objection as to relevancy.

I now offer the document in evidence.

MR. THURMAN: Just a short voir dire this time.

VOIR DIRE EXAMINATION

BY MR. THURMAN:

Q Who wrote this document?

A It was produced by our planning section. Who the precise author was, I couldn't say. It was almost certainly a joint effort by the planning section.

Q Where did the planning section get their direction, from whom?

A In fact what happened was that the BOC International, earlier that year, in 1969, in discussing the basic document as to where we were going --

Q I believe you are getting ahead of me. Be responsive to my questions.

Where do the planning department get their direction from to produce this paper?

A From me.

Q Your initials or name doesn't appear anywhere on there.

A No.

MR. THURMAN: Your Honor, we have no objection to this as being a paper for discussion. We do object if this is represented as policy, which, I don't believe has been brought out.

It says on the first page that this is just a paper prepared for discussion. If that is received for what it is worth, I certainly don't object to that.

JUDGE BARNES: I will receive respondent's Exhibit 60A through Z2.

(BOCRX60A through BOCRX60Z2 was received in evidence.)

MR. TOPKIS: Your Honor, I would like to call toyour attention, the paragraph on the bottom of page B

beginning "nevertheless, the difference will be great."

JUDGE BARNES: Yes.

MR. TOPKIS: I would also like to call Your Honor's attention to subparagraph 6 on the next page, beginning with "Entry by direct venture."

MR. THURMAN: Your Honor, I realize your ruling and I certainly won't argue with you but, I don't think this is proper. The whole document is in. This is a matter for briefs.

JUDGE BARNES: I think it is very proper and I have seen it done many times and it is helpful to me, if, in developing his case, he calls my attention to certain parts of a lengthy document. If there is something that is important here that would assist me in understanding his defense, I think it is perfectly proper to call it to my attention.

MR. THURMAN: I would be glad, on cross, to call some things to your attention which are not being called to your attention on direct.

JUDGE BARNES: You know, in your case in chief, you put about three hundred exhibits in and not once did youtell me, as I recall, some of the important language which, I am certain, should be in some of those documents.

MR. THURMAN: We will tell you the appropriate language at the proper time, when you are deciding the case --

JUDGE BARNES: It might have helped me understand your case while you were proceeding, had you called certain paragraphs to my attention.

MR. THURMAN: I would like to refresh your Honor's recollection, if I may:

In Mr. Topkis' words, he said the document speaks for itself. Put the whole document in --

JUDGE BARNES: I have received the entire exhibit. He wished to direct my attention to certain pages and it is my understanding that that is proper procedure.

MR. TOPKIS: Your Honor, just one last paragraph in this document that I would like to call your attention to and that is on Page D, paragraph numbered 3 headed "Canada as a base?"

JUDGE BARNES: I did not find that page.

MR. TOPKIS: I'm sorry, Your Honor. Perhaps I can show you my copy. It is numbered Page 4 -- Page 3, I beg your pardon. It is numbered Page 3.

JUDGE BARNES: All right, thank you.

BY MR. TOPKIS:

Q Now, sir, you told us that the recommendation, a practical step proposed for conducting a program of desk research at Hammersmith was adopted.

A Yes.

Q For the record, what is Hammersmith?

A Hammersmith House is the group headquarters of the BOC group.

Q In London?

A Yes.

Q And there has been received as complain counsel exhibit 243,a document dated 3 October, 1969 -- I beg your pardon, it is 246, excuse me, please.

MR. TOPKIS: And just so Your Honor will have the sequence in mind, it is the next document in the sequence and may I show Your Honor my copy of it?

JUDGE BARNES: Thank you.

Q Now, referring to Exhibit 246, sir, Mr. Peter Laister's name appears there, it is known to us. Mr. Hesketh Jones' name appears there and he is known to us. Who is Mr. Reckitt?

A In 1969, he was in charge of our welding product division.

Q And Mr. Stafferton?

A Mr. Stafferton, at that time, had charge of part of our medical business.

Q Who was in charge of your gases operation at that time, if one particular individual was?

A Mr. Laister was the managing director, having charge of that.

Q I just asked you, a moment ago about whether the

recommendastion for the making of a desk study was adopted and I find again my friends have anticipated me. I will show you complaint counsel Exhibit 44 received in evidence and ask you whether that is the desk study that ensued?

A Yes, it is.

MR. TOPKIS: I don't think I need call Your Honor's attention to anything about this document other than its bulk.

If Your Honor please, the next item in the development here also has been received in evidence already and I hope Your Honor will forgive me for giving you these in chronology but I think you will understand the story better if I do so. I might say that this document has already been received for a limited purpose.

As Your Honor will see, this is a letter from Mr. Perham of Canox to Dr. Muller and it transmits Mr. Smith's report to the chairman's committee and the minutes of that chairman's committee. It has previously been received for limited purposes and I would now offer it as a record of what happened, that is to say, that Mr. Smith did in fact attend a meeting of the chairman's committee and submitted to that committee a paper and that the committee directed that certain action be taken.

MR. THURMAN: Your Honor, we would like to be privy to this trial. We don't even know what counsel is talking about.

MR. TOPKIS: I am sorry. It is BOC Exhibit 181.

JUDGE BARNES: Is there an objection to the Exhibit?

MR. THURMAN: Has it been offered?

MR. TOPKIS: I think so. If not, I do offer it.

JUDGE BARNES: I take it the cover letter has already been received as a commission exhibit?

MR. TOPKIS: Right, Your Honor. Perhaps it was our exhibit.

MR. THURMAN: It wasn't our exhibit.

MR. TOPKIS: To prove that Dr. Muller received it.

JUDGE BARNES: You offer 181?

MR. TOPKIS: Just to show that he got it but now I am offering it for all purposes.

JUDGE BARNES: That is 181A, B, C and D?

MR. TOPKIS: Right.

JUDGE BARNES: Any objection, Mr. Thurman?

MR. THURMAN: No objection, Your Honor.

JUDGE BARNES: I will receive Commission's Exhibit 181A through D in evidence.

MR. THURMAN: Your Honor, this is respondent's

exhibit.

JUDGE BARNES: Respondent's Exhibit 181A through D, I am sorry.

(BOC RX181A through BOCRX181D received in evidence.)

Q Do you have a copy of that in front of you, Mr. Smith?

A Yes.

Q Could you tell us, please, what the chairman's committee is and what happened as a result of this meeting, reported in 181?

A Yes. In doing so, perhaps I can make a slight exception to your description of the paper.

I was a member of the chairman's committee but not chairman of it. The chairman of the chairman's committee, in 1969 was the chairman of BOC Limited, Mr. Hutchinson. I was bringing the paper to the chairman's committee for the purpose of getting his approval for setting this study in hand.

Now, the chairman's committee was a committee which, the previous chairman wanted as a form of full briefing of what was coming to the next board meeting. In other words, it was a way of keeping him informed of what was coming to the next board meeting and giving him the background to any proposal and that is what happened in

1703

this case. Certainly, the chairman's committee, which had a good deal of authority, being under the hand of the chairman, gave approval to this committee.

Q And to the making of the study which is recorded there?

A Yes, indeed.

Q That study was the so-called Perham Greenfield study?

A That's so.

Q Thank you, sir.

Now, the field notes, pardon me, Mr. Smith, the perham Greenfield report was a two-part document, correct?

A Yes.

Q Comprising a report and underlying notes?

A Yes. It was composed of a whole series of notes of various discussions held with people who occupied a place in the American market and secondly, the putting together of their findings with the ultimate conclusions which they adopted.

Q I show you a document which has already been received in evidence as complaint counsel's exhibit 232 and I ask you whether those are the field notes?

A Yes, they are.

MR. TOPKIS: I think Your Honor has already had an opportunity to glance at this.

JUDGE BARNES: Yes, I have.

Q Now, I will show you BOCRX62 and ask you whether this is the other half of the perham Greenfield report, that is to say, the recommendations and conclusions?

A Yes, they are.

MR. TOPKIS: I offer it in evidence, Your Honor.

JUDGE BARNES: Any objection?

MR. THURMAN: Yes, Your Honor.

We object to this being received in evidence at this time, through this witness. This was written by Mr. Perham and Mr. Greenfield. Mr. Perham will be a witness in this case and we would like a chance to take voir dire at that time to see how it was prepared and if he has the backup documents and such, so we can properly cross-examine. We cannot properly cross-examine this witness on this document.

MR. TOPKIS: If Your Honor please, the backup documents are the field notes which have already been offered and received in evidence as a commission exhibit and for that matter, so far as this witness' competence to talk about it is concerned, the commission also offered as an exhibit, a transmittal letter sending this report directly to Mr. Smith but for reasons which escape me, commission counsel decided to withdraw that exhibit, having offered it. There is no question here.

I will ask the witness a question on foundation.

BY MR. TOPKIS:

Q Mr. Smith, you received this report, didn't you?

A Yes.

MR. TOPKIS: I offer it in evidence.

MR. THURMAN: What does that have to do with it? It has nothing to do with the preparation of the document or how the conclusions were arrived at.

They have a witness coming that they can introduce this through.

Mr. Topkis said over and over, the best evidence rule is the documents and get it from the person who prepared it and certainly this witness is not qualified to authenticate this document. We will say that this study was held. We have no objection to putting it in for the fact that a study was held but not for the truth of the matter or how the conclusions were arrived at and we will stipulate that he received it.

JUDGE BARNES: This was a study that was made and it was sent to the witness and he received it and that is basis for me to receive this as an exhibit in this record.

I will receive BOC Exhibit 62A through S in evidence.

(BOCRX62A through BOCRX62S were received in evidence.)

MR. TOPKIS: Could I call to Your Honor's 1706
attention the first page -- I'm sorry, it is Page B.

JUDGE BARNES: I guess the conclusion you would like me to read?

MR. TOPKIS: The summary and conclusion, Your Honor, if I may.

MR. THURMAN: Your Honor, the admission was made on the basis only that the witness received this. It certainly can't be supportive of the fact that there is any truth --

JUDGE BARNES: The witness stated that he received it. I can read it. It is in the record.

Continue.

MR. TOPKIS: Your Honor, could I just draw your attention to a couple of other brief portions?

On the Page numbered 7 at the top, I don't have the lettering available yet to me, it is headed "Trading Positions" in the upper left.

JUDGE BARNES: Yes, I have it.

MR. TOPKIS: I would ask Your Honor to read that heading "4.1 supply schemes."

JUDGE BARNES: All right.

MR. TOPKIS: And then, Your Honor, lastly --

MR. THURMAN: Your Honor, we are getting into this now. This is an opinion of the person who wrote this.

It is not in there for the matter of what this says is true at all. It is no exception to the business record rule for this document at all.

JUDGE BARNES: This was the report prepared by BOC. You offered half the report and this is the other half. Which half should I give most weight to, the half you put in or the other half?

MR. THURMAN: The half we put in. This says here's a guy's opinion on its unprofitable operation. What is unprofitable?

If it was unprofitable, none of them would be in business.

JUDGE BARNES: I see they quote Mr. Flam in here.

I understand what type of document it is but it is a document that can be received into the record.

Now, the weight I give to it is another matter.

MR. TOPRIS: Just one last portion that I would call to Your Honor's attention and that is on the page numbered 13 headed "scope for possible venture."

MR. THURMAN: Does Your Honor understand that this is not this witness' opinion but it is another person's opinion?

JUDGE BARNES: It was an opinion given to him as director of BOC.

MR. THURMAN: He wasn't the chairman at that time, I don't believe, either.

JUDGE BARNES: Are you going to tell me that Mr. Smith relied on some report or this report or --

MR. THURMAN: I don't know whether he relied on any report.

JUDGE BARNES: You can ask him that.

Continue.

BY MR. TOPKIS:

Q Sir, what happened with the perham Greenfield report?

A I subsequently reported the conclusions to, first of all, to the chairman's committee to whom I had originally reported and secondly to the BOC board and next, to the BOC International meeting which occurred two months later.

Q And what action resulted?

A In all three cases, there was acceptance of these conclusions.

Q Was there any dissent?

A No.

Q Now, so far as you personally are concerned, I think Mr. Thurman said that this was the opinion of Mr. Perham and not yours.

Did you accept and adopt this report?

A I certainly did.

Q Agreed with its conclusions?

A Yes.

Q All right, sir.

MR. TOPKIS: If I may, Your Honor, perhaps in a -- perhaps being over cautious, perhaps -- well, can we have in camera treatment of this document?

MR. THURMAN: They don't need in camera treatment of this document. There is nothing sensitive about it. They went into the market later on. There were other documents that went int with this which had information that I don't know how they got out of competitors. That was information sensitive to the third parties. In this report, there is no sensitivity that I can see.

It is an opinion of one man in an organization --

JUDGE BARNES: Two men.

MR. THURMAN: Well, make it two men.

JUDGE BARNES: Mr. Topkis, the report is now four years old and I wonder if it is that sensitive.

MR. TOPKIS: Well, Your Honor, if I may just call your attention to -- I won't read it into the record but take a look, please, at the second page from the end. The last sentence on that page beginning with "The one unionized distributor --" does Your Honor see it?

That person is identifiable, Your Honor.

MR. THURMAN: We suggest that it be excised.

MR. TOPKIS: I can go through it and find others, it is silly.

JUDGE BARNES: I put the first part of the report in camera. I will receive 62A through S in camera.

MR. TOPKIS: Your Honor will perhaps recall that it was agreed that we both would be free to refer in our briefs to material in these two particular in camera documents so long as we didn't reprint any embarrassing material. I am sure we can have the same understanding with this one.

JUDGE BARNES: All right.

BY MR. TOPKIS:

Q Now, I would like to ask you, please, sir, following the receipt of the Perham Greenfield report, what did you do about the US gases field afterward?

A What we did was to continue to be very interested in what was going on in the American industrial gas market but what the Perham Greenfield report told us was that it confirmed an existing belief which existed among all of the top management of the BOC GRoup was that there was no practical way of coming into the American market.

Q Did you, sir, subsequently, that is to say, did the BOC board subsequently adopt a program of priorities of investment?

A Yes, we did.

Q I show you a copy of BOCRX67.

MR. TOPKIS: Again, Your Honor, my apology for the pagination.

Q -- and I ask you to tell his Honor what this document is.

A Yes.

This was a paper which, in fact, I wrote and gave to the board which attempted to apply some judgment as to the priority of the use of our resourses, in particular, financial resourses.

Q If I may take you through it page by page, the cover page marked "Minutes of board meeting 21, July, 1970," is that an extract from the minutes of the BOC board?

A Yes, it is.

Q And the next page marked"International Development" is a document -- well, it is the start of a nine-page document which I will take it, you wrote, is that correct?

A Yes, sir.

MR. TOPKIS: Your Honor, I would offer BOCRX67 in evidence.

JUDGE BARNES: Any objection, Mr. Thurman?

MR. THURMAN: We have no objection, Your Honor.

JUDGE BARNES: I will received Respondent Exhibit RX67A through J.

(BOCRX67A through BOCRX67J were received 1712
in evidence.)

Q Turning your attention to the first page of this document, Mr. Smith --

MR. TOPKIS: May I say, Your Honor, that we would appreciate in camera treatment of this document before we go on because as you see, it reflects BOC long range planning.

JUDGE BARNES: You should offer it in camera originally before we --

MR. TOPKIS: I apologize.

JUDGE BARNES: Mr. Thurman, any objection to in camera treatment?

MR. THURMAN: Mr. Topkis says long range plans, I don't see anything about that on here. We have a whole record of in camera documents. Our findings will be confidential. It is difficult to write findings and decisions when you put everything in camera. Where I can see that this is a long range plan, perhaps I will withdraw the objection.

MR. TOPKIS: This is a formation of a program of resourses -- any one of this company's competitors can pick up this document and know that as of mid-1970 this is a program of BOC --

MR. THURMAN: Maybe I am late on my objection

but I can see a relevancy problem. This has nothing to do with investing in a market -- this talks about expansion of an existing company, it is really not relevant.

JUDGE BARNES: There is something on page 4 that says "USA" on there.

MR. THURMAN: They are talking about Fraser Sweatman and Harris Lake.

MR. TOPKIS: Not so, Your Honor.

MR. THURMAN: Or what business they are distributing in this country.

JUDGE BARNES: I am going to receive this exhibit in camera RX67A through RX67J.

MR. THURMAN: I refer to the last page also which refers to their existing business --

JUDGE BARNES: I have received it in evidence and I have received it in camera.

Let's take a ten-minute recess.

(Whereupon a recess was taken.)

JUDGE BARNES: On the record.

BY MR. TOPKIS:

Q Mr. Smith, drawing your attention to Exhibit BOCRX67, and specifically to the last line of the first page, Page A, you see a figure there on the right for Japan, USA and South America, you see that figure?

A Yes.

Q I ask you, sir, whether that figure contained any element for gases in the USA?

A No.

Q Let me ask you this, sir. So far as the priorities of investment established in this document BOCRX67 are concerned, and having specific reference to the position occupied by Japan, USA and South America, was there any change made in those priorities between the date of the minute, July 21, 1970 and the time that you began discussions with Airco in mid-1973?

A No. It occupied essentially the same place in the list of priorities.

Q Now, did you know that sometime in 1971 a man named Charles Perkins had been in London?

A I didn't know at the time. I was informed subsequently.

Q Did anything come of it?

A Nothing at all.

Q Until the time you begin considering an arrangement

with Airco, did BOC, it's top management, have any intention whatsoever of entering the US gases field?

A None whatsoever.

MR. THURMAN: Objection. Objection, Your Honor. This calls for a conclusion, unless he's got some document to show they did not intend to do it.

He has already stated we maintained our interest in entering into the market at some time. This market has nothing to do with the entering of gas. This is existing business in USA. It stated that. It has nothing to do with priorities as far as the acquisition-

JUDGE BARNES: The Chairman of BOC can testify as a fact that BOC had no intention of entering the US market, can't he? Why can't he?

MR. THURMAN: He can say -- the facts speak for themselves, when they look to other things. He can say, as chairman, he had no intention of entering the market. But, Your Honor, to qualify things here, all he has to say is we adopted this. You don't adopt things in a corporation without having a minute on it or something like that. I'm really surprised that this is being admitted as being an adoption as such by a witness' word, when there is certainly better evidence following Mr. Topkis' lead that the best evidence --

JUDGE BARNES: This is the way Mr. Topkis chooses

to present his case, and the evidence is competent and I'm receiving it.

BY MR. TOPKIS:

Q Before we come to discuss the transaction with Airco, which is here under review, I would like to go back in time, and tell us about a joint venture, according to this record, came into being -- or, no. Let me put it differently, if I may.

Let me ask you to trace for his Honor the history of relations between BOC and Airco going back as far as your personal knowledge goes.

A Yes.

It certainly goes back to when I first jointed BOC, in the mid-fifties, because at that time there was between the two companies a series of licensing arrangements.

Now, those in fact were almost entirely concentrated on the welding side.

So far as I'm aware, there was no licensing which affected the industrial gas side.

Nevertheless, that welding license arrangement, cross-arrangement, did permit contact between the two companies.

Now, the first thing which really brought us into really more close contact was of course the joint venture in plant.

I'm speaking from memory. I think the discussions and the formation of that joint venture took place in '67.

Now, what I think happened in that case was that the BOC were looking for ways of expanding the market for our plant activity.

Q When you say your plant activity, are you referring to the air separation?

A This is the air separation design, the manufacturing activity.

Q The one that you referred to earlier at Edmington?

A That's right, at Edmington, North London.

We were looking for ways of expanding in market and quite clearly, since the states market is something approaching half the total free world market, it was of concern and interest to us.

And I believe our look of how we should go about this coincided with a look which Airco was taking at exactly the same sort of time as to how they would have a close association with the supply of plant, of air separation plant.

Q This is '67?

A This is '67.

So what happened was that the two sides came together almost naturally, we wanting to expand our market, Airco

wanting a reliable source of air separation plant and equipment.

Q Airco did not have any facilities for making air separation plants at the time?

A No, they did not.

Now, we put the joint venture together. The form it took was that two companies were formed, one in the States and one in Britain, and both Airco and BOC had fifty percent of each of those two companies.

And the intention was that while design and the marketing of plants in this country would be in the hands of Airco-BOC, which was the name of the American half, the manufacture of the cold box would continue at Edmonton factory in North London.

Q Forgive my interruption. To clarify the record, cold box, that's the guts of the separation plant?

A That's the guts in which the process takes place in an air separation plant.

Now, what we found in the course of the life of that joint venture was that the situation in the industrial gas business and indeed in the steel business in this country was flat, and that the opportunity for building and selling more plants in this country, because of the state of the industry and the steel industry, and to a lessor extent the chemical industry, was not as great

as both sides had hoped when the thing was first formed.

And we concluded, after some three, three and a half years of experience in that joint venture, that we should bring it to an end, that there was nothing to be gained by continuing it.

And so as a natural agreement between the two companies,we quite amicably separated the company again and went our own ways.

Q Terminated the joint venture?

A Terminated the joint venture.

Now, the next step which took place in our relations with Airco occurred, again from memory, around the summer of '72, which was when we bought the Airoo welding interest in Canada.

Q Excuse my interrupting.

And staying with the joint venture just a moment, did the joint venture sell and build any air separation plants in the United States?

A Yes, it did. Two I'm quite sure were built under the joint venture. The latter two I'm not quite sure. I think they came in the tail end, and were completed after the joint venture had been completed.

Q But had been brought about under the aegis of the joint venture?

A Oh, yes.

Q Prior to that time, prior to the joint venture that is to say,had BOC been able to sell any air separation plants in the United States?

A No.

Q So the joint venture came to an end. And you were about to say the next development was?

A Our purchase of the Airco welding interests in Canada.

Q That was when, sir?

A I'm speaking from memory, but I think it was the summer of 1972.

Q All right. Was there any other development in the relations between the two companies prior to the beginning of the discussions that led to the transaction here under review?

A Not that I can recall to mind.

Q Would you then, please, tell his Honor how it came about that BOC acquired a stock interest in Airco?

A Certainly.

MR. THURMAN: We object on the relevancy, that they did acquire. What relevancy is it how they went about it?

JUDGE BARNES: I think it's good background information to find out. I would like to know myself.

MR. THURMAN: You violated the law and wantto

tell how you violate it, that's fine.

A I think as a result of the continuing association between the two companies, the top management on both sides had got to know each other pretty well.

And speaking certaily for the BOC top management, they found themselves -- we found ourselves in a position where we were easily able to talk with our counterparts in Airco. They seemed the sort of people with whom it was easy to form a genuine association. And there had been a continuing, if you like, social relationship between various members on our side with counterparts on the Airco side, and friendships had been formed.

Now, in the spring -- no, in the summer of 1973, what happened was this, that one of the top executives of Airco called on a purely social occasion on one o-f our managing directors, Mr. Peter Laister, in the course of a visit to UK. And they were having supper togather, in fact, in Mr. Laister's home.

And there was a general discussion as one would expect, of what was happening in the two companies and in the two countries.

And I think from that discussion emerged a thought that in view of what was happening in the economy in the States and what was happening in the economy of the UK, there might be an advantage if some closer association

could be brought about between Airco and BOC. It was no more than a sort of preliminary exchange of views over a cup of coffee, sort of thing that I think is quite normal in any business scene.

However that may be, Mr. Laister subsequently told me that there seemed to be some sympathy between the two of them on this subject, and equally I don't doubt the executive on the Airco side reported similarly to the board chairman of Airco.

And some few days later the president of Airco telephoned me and asked whether I could meet him to take this discussion a little further.

Q The president being Mr. Giordano?

A That's right.

And in fact we met in London on a Saturday afternoon, which is something I don't often do if I can avoid it, and we talked around the possibility. It was no more than that discussion.

I think so far as we were concerned, the main interest arose from the fact that while we were still intensely interested in what was going on in the American market, we had nevertheless ruled out any possibility of getting in on the ground as BOC in the American market. And I can go into the reasons for doing so quite happily sometime if you wish.

Q By going in on the ground, you mean going in afresh without any acquisition or anything?

A Oh, by any means, going in afresh or by acquisition or any others.

Q I see.

A That we had firmly turned away from in our minds but with great regret.

So this possibility came to us, certainly came to me in the course of that discussion, offering something out of the blue which I could not have possibly anticipated.

It was certainly in pursuance of our stated objective of becoming a more international company, and I would guess that on Airco's side, because the --

Q Well, forgive me, sir, but let's leave Airco tell their own story.

If you would, just take it up from the time of your meeting with Mr. Giordano.

After that meeting what did you do?

A Well, after that meeting I reported to my board.

Q About what? When was this?

A Oh, this was no more than two or three weeks after the discussion with Mr. Giordano.

Q Sometime in July?

A Sometime in July, yes.

Now, at that stage of course I didn't have very much

to report. All I could say was that I had had a discussion and that there appeared to be sufficient grounds for taking it further. And the board said fine, by all means do so. Nothing can be lost by it.

The result of that was that we agreed on both sides to set up a small working party to examine whether a basis existed for bringing the two companies closer together, and if so, what form of association should be adopted.

And in fact what then happened, I think I am right in saying it was in August of '73, two of our managing directors, Mr. Laister, Mr. Williams, and the man in charge of our corporate strategy, Paul Bossonnet, those three men came to New York and sat down with Airco top executives to talk around it and to exchange some information as to whether the base existed and if so what sort of base.

The next thing that happened in sort of chronological order of things, I think was the appearance of Mr. Berners of Curtis-Wright who approached Airco to say that he would be interested in acquiring part of their equity.

There were of course further discussions between ourselves and Airco while this approach was being considered by Airco.

And quite soon after that, Mr. Berners announced to the Airco board that he had after all decided not to go ahead with bidding or part of the Airco equity. And this

I daresay caused us some relief at least in that it meant that we felt that we could proceed with out study sensibly and in depth without that threat hanging over our heads that somebody else might intervene. And that was what was done.

The study continued. There were discussions on both sides. In fact, I then went off to Australia.

And the next thing that occurred was the announcement by Mr. Berners that after all he had decided to make a bid and in effect he placed that bid on the Airco board table. And that of course caused us all to think pretty quickly as to what steps we should now take.

Q Let's stop right there. You are in Australia?

A Yes.

Q What's the date approximately?

A This is either the very end of September, beginning of October of '73, that sort of date.

Q Could it be November?

A So much happened during those few months I could easily be wrong. I could turn it up if it is significant. I can easily turn it up.

Q In any event, Mr. Berners announced he wants to make a bid for Airco stock?

A Yes.

Q Was a figure mentioned?

A Yes. I think originally he was saying he wanted 25 percent.

Q Was a price mentioned?

A Yes, $18.

Q He was asking the cooperation of the Airco board in making that tender offer, is that it, or what?

A He was asking for it --

MR. THURMAN: Objection, no foundation.

MR. TOPKIS: I am inquiring of what was reported to the witness, not what actually happened.

JUDGE BARNES: Is this what was reported to the witness?

BY MR. TOPKIS:

Q What was reported to you?

A What I am saying is he had indeed asked for it but he was unlikely to get it.

MR. THURMAN: Reported by whom? Let's get a foundation here.

BY MR. TOPKIS:

Q Who told you, Mr. Smith?

A The chairman and president of Airco.

Q Mr. Dillon and Mr. Giordano?

A Yes.

Q All right, Mr. Smith, what happened then, sir? Berners made his bid. What happened then?

A What happened then, BOC and Airco went further into the study of what could be done together and there were many, many discussions as to the action which we, as far as BOC is concerned, the action we should take.

This was being continually referred to our board of course.

And the upshot of it all was that with the support of the Airco board we said that we would bid for three million shares and would accept up to a maximum of four million shares.

Q At what price?

A That was at twenty dollars.

Q And what happened?

A Well, our tender was successful. In fact, it was over-subscribed. And the four million shares were offered to us and we duly bought them in.

Q At $20 a share?

A At $20 a share.

Q And at a purchase price then of $80 million plus expenses?

A That's right.

Q Have you since added any shares?

A No.

Q So that is where matters stand as of this moment?

A Yes, it is.

Q Now, you have told us the view that BOC had as to possible involvement in the American gases business prior to this -- prior to the date of the dealings with Airco, the dealings that wound up in the purchase that you just described.

Will youplease tell us, sir, in the light of that background the reasons which moved BOC and I am calling for the collective judgment of the top management of BOC headed by you, which moved BOC to make this purchase?

A If I could put them not necessarily in order of priority.

MR. THURMAN: Objection.

We would like to know whether he is speaking on his own, or if there are documents -- sometimes they show up in the minutes.

But we haven't gotten any other minutes. There are documents to show what their reasons for it are.

Documents seem to showup when they want something for their benefit.

But they don't seem to have any documents on anything which is as important as this, is why we are not going into the business or why we are.

We would like to ask at this time if there are any documents that show the reasons or no reasons.

If there are, that is the best evidence. And as Mr. Topkis has pointed out many times, there is no need to get this from this witness.

JUDGE BARNES: Mr. Topkis is not limited to documents in presenting hisside of the case.

On cross-examination you might explore that if you feel it is relevant.

MR. THURMAN: We have no objection if Mr. Smith testifies personally.

JUDGE BARNES: Well, he is testifying as chairman of BOC.

I think he is testifying for the company.

If it is your own personal view, we would like to know the distinction in those cases.

THE WITNESS: Well, they are certainly m y personal views but they were ones which were entirely shared by the rest of the BOC board.

And in our discussions, what we found was that there was unanimity about why we should do it.

I think the first factor I've already referred to, that weknew enough about Airco to know that these were people with whom we could work amicably, and fundamentally there was no difference of view as to the management philosophy and attitude to the business.

I think that was very important in our minds.

T

The second reason was that despite having had to turn our backs on the American market in the belief that there was no way in, the fact is that the American market is much the most powerful and largest in the world, and it must be of continuing interest to any company which has ambitions to act internationally.

The third reason is that the American market, partly as a result of its size, is the source of much technology, much new development, and we have to be in tune with that.

We have to keep pace with that.

And there was no better way of doing it than by getting an interest in Airco.

The international -- the industrial gas business has moved in the last five, seven years to really being a well competitive situation.

In fact, the single national economy is very rarely these days sufficient to maintain the pace of development and to get the best out of capital resources and technological resources.

And this is why or partly why the world scene is dominated by a handful of international companies.

Now, two of the international competitors with whom we meet at different parts in the world are American companies.

And certainly we saw an advantage in being present in the same market in which our own international competitors are present.

Q What two do you have in mind, sir?

A Air products and Union Carbide.

Q All right.

A And lastly,but I don't doubt just as important, is our belief that at the price we were paying for Airco we would get a reasonable return, and in circumstances much better than anything else we could have devised so far as American markets are concerned.

I think I've covered most of the points.

Q Let me see if I can resolve a couple of ambiguities in my own mind.

When you speak of the price that you could acquire this stock at, were you thinking in terms of the price earnings ratio, or in terms of yield to BOC on investment, or what?

A I was thinking -- we were thinking in terms of the likely return from the token investment.

At twenty dollars, we were looking at a price earnings ratio on '73 earnings of something of the order of about 13.

Now, of course, this was the situation partly affected by the downturn in the American market which

predated the downturn in our own market in London by some six or eight months.

Q By market, you mean stock market?

A Stock market.

It had nothing to do, let me add, with the asset value of Airco.

It was not a consideration in our minds.

Q You were concerned with the earnings?

A Indeed.

There was one other factor I assumed but perhaps I ought to state, and that is that it is our genuine belief that both companies have much to offer the other.

Now, just how much we don't know. We still have to sit down and talk about it and examine what each company is doing and how it does it.

But we are convinced on our side that we can bring something to Airco.

If nothing else, it would be the experience we have in operating internationally.

It might also be that the plant manufacture could be of assistance.

And I don't doubt we also have things to learn from Airco, that they are operating in a market far bigger than our UK market and have experience in the market-

place from which we could obtain benefit.

And I like to think that Airco would take the same view of BOC, that they can gain some benefit from us and at the same time learn something from us.

Q There was reference in one of the documents which you identified and which was received in evidence, and indeed there was referende in your earlier testimo-y to BOC's ambition to be ever more international, ever more multi-national.

Did that play a role in this decision?

A Yes.

I don't believe that one can really claim to be a multi-national company without operating in the North American market.

Q Did the scope of Airco's operations pretty much throughout the United States play any role in your decision?

MR. THURMAN: It's a leading question, your Honor.

MR. TOPKIS: Well, I have exhausted the witness' statement and I am asking whether any other factors played a role.

MR. THURMAN: Ask him what factors. Don't lead him, telling him what factor might have played a role.

It's leading as it can b-e.

JUDGE BARNES: Well, he has, as he said, exhausted his recollection on the subject.

MR. THURMAN: Okay. Then he stops. He still doesn't lead a witness.

JUDGE BARNES: The question is proper.

You may answer.

A I'm sorry. May I have the question again?

MR. TOPKIS: If I may, your Honor, I will rephrase it.

BY MR. TOPKIS:

Q Did the scope of Airco's operations throughout the continental United States have any role in your decision?

A Yes, it did.

Q Would you please explain.

A I'd like to explain, if I may, by describing the American market as we saw it.

It may not be right but it's as we saw it, and certainly it was confirmed to us by, among other things, the Perham-Greenfield report.

Now, the way we looked at the market was to say that so far as the national bulk producers are concerned, there are only three companies: Union Carbide, Air Products, and Airco.

And that's at one end of the total spectrum of the

market.

And at the other end of the market there is a host of the small distributors.

Now, what we have been saying to ourselves is that there is no hope, there is no commercial sense whatsoever in us attempting to get into the national bulk producers end of the market.

And this is why we have constantly said to ourselves this is what will cost us a hundred million sterling and take ten years to do.

It is a guess, but it is of that sort of order and commercially it does not make sense, certainly not for BOC.

And at the other end of the market, the small distributor, this, too, we said no to. And we said no fo r this reason:

Those small distributor companies are for the most part family companies, and they are run by individuals who are totally integrated into the local scene, whether it be a city, a town or a village or whatever.

And they get by primarily by providing a very thorough service to their local community customer.

And they do it by providing not just gas, industrial gas, but by accompanying it with welding equipment.

And the great bulk of distributors of gas in this country sell both gas and equipment.

Now, what we had said to ourselves was, we could not do that job any better. We could not come along with all the encumbrances of a large corporation and do that job anything like as well as it is now being done by the small family concern.

We could not get ourselves part of the fabric of the local community as well as the individual who does it today.

We could not draw supplies of welding equipment or of gas from American suppliers in the same way he can. He can shoparound. We couldn't.

In fact, the likelihood is that we would have great difficulty in getting supplies of welding and gas if we were to be small distributors in the states.

And of course, we would not be using what we think we know best.

We would have no application of our technology. We would have no application of our ability to run large-scale plants.

What we would be talking about is a power distributorship. And we are no better at that than anybody else.

In fact, we are probably worse.

So we said there is no case for us going. And this is why the Perham-Greenfield report was accepted immediately.

There is no case for us going into the small distributor end of the market.

So, commercial reasons moved us out from the bulk natural producer.

Commercial reasons ruled us out from the small distributor end.

And what was left was that handful of companies in the middle which are neither one or the other.

These consist I suppose of Big Three, Liquid Carbon, Chemitron, Burdet.

It is our belief, I may well be wrong, but it is our belief that those companies manage by being able to concentrate or by concentrating either on a single geographic area or on a single product.

For instance, we believe that the Big Three is a company that because it has secured domination of a particular part of the states, it gets by extrmeely well.

Q What part is that?

A That's Houston, Texas, and all of that industrial complex down there.

Liquid carbonicx, mostly in carbon dioxide. And there is no doubt, I think certainly again from our point of view, with all humility, we may well be wrong, we think with the exception of Big Three, who have secured this geographic domination, that the other companies who rely on concentration of a product would not appear to us to be as good an investment as anything else that we could contemplate in the states.

We don't believe that the financial record of those companies is one that we would find all that attractive.

I think the reasons for it is quite obvious.

It is of course from that small group of companies that we have been approached from time to time during the sixties as to whether we would be interested in taking some part.

Q You mean Chemitron and Burdett of Cleveland and so on?

A That's right.

Q So if I may ask you to sum up the pecularity of the Airco oppostunity, the transaction was that it offered you a natural scope in one jump?

A Precisely.

Something that we could not have contemplated and certainly didn't expect.

Q Youspoke of small distributor-like companies.

Where would you put a company like Alabama Oxygen if that name is familiar to you?

A I'm sorry, I don't know what they do but it must be a kind of small company.

Q Have you ever heard of an outfit called Burdett of Norristown?

A Yes, this is Mr. Perkins, isn't it?

Q Right.

A Yes.

Q Is that a distributor or producer or what?

A As I understand it, it's a distributor but it has some small production capacity.

Q Apart from the companies such as Chemitron, Big Three, Burdett of Cleveland, Liquid Carbonic and the national companies, and of course L'Air Liquidé or Liquid Air, is there any gases company to your knowledge in the United States or was there last Decembver which had annual sales of $5 million or over?

MR. THURMAN: Objection. No foundation.

JUDGE BARNES: To his knowledge, if he knows.

A I'm not aware of such.

Q All right, sir.

Did the availability of financing have anything to do with your decision to undertake the Airco stock anquisi-

t ?

MR. THURMAN: Objection. Leading question.

JUDGE BARNES: It's a question that can be answered yes or no.

Is it leading?

MR. THURMAN: I might suggest to help Mr. Topkis out on this, what went in, what were the factors that went into it.

That's the only question he should be allowed to ask, not tell him what factors he did consider or should have considered. Ask him.

The man was there. He knows what he considered and what he didn't.

And he shouldn't have a suggestion from Mr. Topkis.

Now that it has been put in his mind the witness should go ahead and leave that area. He has put in mind the scope already, and now he said, oh, yes, the scope was.

And now he has put in another area. After youput in a leading question, it has no effect.

You get overruled and ask a direct question. He ought to be required to go to something else.

JUDGE BARNES: I think you should exercise as much caution in examining your own witness, Mr. Topkis.

MR. TOPKIS: I will do so, your Honor. I will skip the question.

Q You testified before about the effects on Airco, possible benefits to Airco, I think you said, of BOC's acquiring the stock interest in it, and you mentioned something about Airco's lacking a plant-producing capacity.

Could you expand on that, sir?

Explain to us what you mean by it.

A Yes.

It is our view that to have an in-house facility of that kind, an ability to design plant, design a manufacturingplant, is an advantage when it comes to the marketplace, that the negotiations on the supply scheme, as between industrial gas company, the customer, and the plant's supplier, is made somewhat easier, somewhat simpler by having all three, so to speak, in hand, rather than they should all be at arm's length.

And it is our belief that it does enable an industrial gas company to act more flexibly, to perhaps offer the steel maker or the chemicals maker,, whoever it might be wants the supply, a better scheme, one more adaptable.

This is a matter of opinion but it is the opinion that we hold.

Q Big Three doesn't have any plant building capacity, does it, sir?

A No, it doesn't.

Q They are doing pretty well?

MR. THURMAN: Your Honor, it is already in now. It doesn't make any difference.

Why does Big Three have --

MR. TOPKIS: I'm sorry, your Honor.

But there isn't a person here in this room who doesn't know Big Three has plant building capacity.

MR. THURMAN: If it is in the record, why do you ask the question?

MR. TOPKIS: As a preliminary, of course.

MR. THURMAN: You told him it didn't have it.

JUDGE BARNES: You ask him if he knows any companies that do not have it and let him name them, a better way of proceeding.

MR. TOPKIS: I'm sorry,your Honor.

JUDGE BARNES: You may proceed.

Q Mr. Smith, how doyou recognize what you describe as BOC's Big Three success with its lack of plant building capacity, if you do?

MR. THURMAN: I object.

The best evidence is Big Three.

BY MR. TOPKIS:

Q You said just a moment ago that if you went into the American gases business as a distributor, BOC might have some difficulty in getting gases and equipment from a company which, to which you might turn.

Why would that be?

A Because almost inevitably on the gas side we would be requiring our suppliers from somebody with whom we are in com petition elsewhere in the world.

That isn't going to make our life any easier.

On the welding side, despite fhe fact that we have a pretty full range of welding equipment ourselves, it is not welding equipment to which the American market is accustomed and we couldn't use our own welding equipment.

We would have to buy it in from somebody else.

Q All right, sir.

Now, I am going to ask you to turn your mind back to late November, early December, 1973, and ask you as of that date otanswer this question for his Honor and the record.

Had you not acquired a stock interest in Airco, would BOC have entered the American, United States, gases business in any way in the foreseeable future?

MR. THURMAN: Objection.

It's an anternate question for your Honor to decide from the facts in the record.

And now, after the entry in the market there is no way for a witness -- a top official of a company, to sit there and say no or yes, whatever his answer would be.

But regardless of his answer, there is no way.

The contemporaneous documents and facts of what happened is what your Honor will draw this conclusion, whether they would have entered or whether they would not have.

JUDGE BARNES: I will draw -he ultimateconclusion. But it is proper for Mr. Smith to testify as to the subjective intent of BOC, proper evidence.

MR. THURMAN: We would object on a time period when they would enter.

You know, your Honor, the testimony is very, very, without question, there is not a balance any more.

Supply cannot keep up with demand in the last two years.

This might even get better than ever

Is he projecting now he would not enter at this time, or is he talking about future, five, ten years

22

from now?

JUDGE BARNES: You put a time frame in your question, didn't you?

MR. TOPKIS: I said the foreseeable future.

MR. THURMAN: I don't know what foreseeable means.

MR. TOPKIS: I said the foreseeable future.

MR. THURMAN: I don't know what foreseeable means.

MR. TOPKIS: I could be more precise but IU thought that's really the time frame that the decisions have in mind.

JUDGE BARNES: I believe it is.

I don't believe there is any time limit in the decisions, would they enter into the foreseeable future.

MR. THURMAN: We would object on pure speculation, market improvement.

Certainly there have to be factors that haven't been developed.

I am sure this witness, I don't think he would even attempt to answer such a question like that at this time.

JUDGE BARNES: I think he will.

MR. THURMAN: I would be surprised.

I would not, within the market, they said they

want to go worldwide, the market improves.

JUDGE BARNES: You are arguing all of the record to me now.

I think it is proper for the chairman of BOC to answer this question.

MR. THURMAN: Maybe I'm arguing the record.

I won'd dispute your Honor. I am just trying to point out to your Honor why this question is meaningless and his naswer is meaningless.

JUDGE BARNES: You may answer, Mr. Smith.

Do you recall the question?

THE WITNESS: Yes.

I cannot conceive any circumstances whatsoever that would bring BOC into the American market in the foreseeable future, barring Airco.

BY MR. TOPKIS:

Q Would you break down your answer to consideration of entry on a green field or grass roots basis?

And on a toehold acquisition basis, and explain those two alternative techniques to his Honor?

A Yes.

I think in fact I have covered a good deal of this already.

I tried to get at any rate.

So far as green field, start in the bulk

market, the bulk producing market is concerned, I haven't changed the view which I expressed in the preliminary hearing that this is commercial nonsense.

Q Just so we may be clear.

You speak of the bulk market.

What do you mean?

A This is the large scale tonnage production.

Q You mean --

A From which the liquid is taken to serve the merchant market, American market.

Q What are you contemplating, sir?

Is it finding yourself a tonnage supply scheme and going on from there, or what?

A That's the usual means.

The usual means of entering into the market, de nova, is to bid successfully for a supply scheme.

In other words, the supply on tonnage scale to a steel works or a chemicsla works, to put in an oversize plant.

By that I mean, if the steel maker requires, say, 600 tons per day of oxygen, the usual thing to do is for the industrial gas company to put down a plant which is capable of producing more than 600 tons per day, and usually 700, 800 tons per day, so that he can obtain the advantage of large-scale production on his costs.

He will supply the 600 tons down a pipeline to the steel works.

And the other 200 tons per day he will have available at this low cost, because of the higher scale, to sell into the ordinary merchant market where higher prices can be ob tained.

Now, that is the usual method of entering that end of the market, the bulk producing end of the market.

It's the considered view, not merely of myself, but the whole of BOC board and the whole of BOC top management, and indeed of all of our overseas companies who have experience in thismarket, that to attempt this entry in this market in America, where the advantage is to those already on the ground, established on the ground in supply schemes, is so overwhelming, that for an outsider, a newcomer to attempt to do that is commercially not feasible.

As I say, my guess is that if we wanted to try and do it that way, it would cost us at least a hundred million sterling, a hundred million pounds sterling, and would take ten years to do.

This is why it is just not feasible for as as BOC is concerned.

Now, that very briefly is why we have said

to ourselves, with sorrow, that there is no way for us to contemplate that sort of entry into the American market.

Then again, at the other end of the market, the distributor end of the market, I think I've explained our reasons for saying --

Q Before I go to that, can I ask you a question or two.

You spoke of the advantages that those on the ground have over an outsider.

Can you explain what those advantages are?

A Yes, certainly.

The first advantage is that the established supply has, he has already got an operating day to day relatio-ship between himself as the gas supplier and the steel works or the chemical works management.

Inevitably, they see each other every day. They establish a relationship which quite naturally the steel maker is reluctant to break.

He doesn't want a new set of relationships tohave to learn.

That's the first thing.

The second thing is that a steel maker or chemicals maker would be reluctant to see two separate companies on his site supplying the same product, whether it be oxygen or nitrogen.

D doesn't matter much.

In other words, he wouldn't want two compaies to operate on.

He wouldn't want two contracts. He wouldn't want two different plants.

There is a natural reluctance for him to do that.

They would much sooner have a continuation and expansion of what they already know, what they already have.

The third reason is simply this, that the established supplier in almost every case that I know, with very few exceptions, he has got thecontract by providing gas to the tonnage customer, the steel works or whoever, at little more than the cost of money, and he makes his profit by distributing the spare liquid, in liquid/gaseous form, if necessary.

Q In the gaseous form?

A Gaseous in liquid into the American market.

He will sell that into the merchant market having the advantage of low-cost production.

Now, if he has got the merchant market already, he is happy. He hasn't got thebusiness of producing -- promoting himself into the merchant market.

A newcomer coming into that situation, he may well have 200 tons of liquid available to sell into

the merchant market but he hasn't got a market.

He has to grow one. He has to win that market either from an existing competitor or he has to wait until the growth in the market enables him to take up that surplus he has got available.

That is an extremely costly and slow process.

And I think finally, so far as the advantage of the established supply is concerned, there is a reluctance, and it is a very natural one, for an American steelmaker to look at a foreign plant, not because it is foreign, I wouldn't like to suggest that for a moment, but because it is something new to him.

He knows there are very few British separation, air separation plants in the states.

Why should he take a chance on using a British-made plant when he has an established connection, has an established reliability with an American producer of plants.

And, understandably, it takes -- he has to sort of hae a very peculiar set of circumstances that would make him say, yes, okay, I haven't heard of BOC but I'm very happy that you have come onto my site, build your plant and supplyme with gas for the next fifteen years.

And I understand that.

All these things add up to the sad advantages which the established supplier has over the newcomer.

Most important of all is that the established man nearly always, because of the nature of the business, is making his profit through having a share of the merchant market, which is what the newcomer doesn't have.

I hope I've made it clear.

Q Yes.

I would like to ask you one other question on that subject.

Does the concept of back-up play any role here?

A Yes, it does.

Q Would you explain that to his Honor along with telling his Honor what back-up means?

A Yes, indeed.

Back up is merely providing liquid in support of the plant which you put down to supply the steel maker.

In other words, these tonnage planks, every so often either stop working for one reason or another, or have to be taken out of commission for maintenance, or simply there is a fail somewhere in the process or in the pipe work.

And when that happens, the oxygen is no longer flowing into the steel works and of course there is a tremendous risk hanging on having the whole steel works come to a full stop because there is no oxygen available there.

Now, in that situation it is critical that you can supply the steel works through other means.

This is a situationwhich we commonly have, for instance, in the UK's major steel works. We cannot allow it to come to a stop because of the fail of the oxygen supply.

And we have to make arrangements and have made arrangements whereby we can provide back-up to the existing plant by taking liquid supplies from elsewhere and shipping it in.

Now, here again, a newcomer is faced with a grave disadvantage if he is not able to secure back-up supplies.

And in the case of BOC again, it means probably going, at least the chances are, probably going to one of our competitors to provide that back-up.

Now, no doubt it is or it can be done, on terms. But it is difficult to arrange and obviously it is a very much more satisfactory situation if one can provide one's own reliable back-up to the tonnage plant.

Q Companies seeking supply schemes want back-up around, is that what you are saying?

A Oh, certainly they do.

They need the assurance that in the event of fail of the plant for any reason at all that the oxygen supply shall be maintained.

Q Between the date of the Perham-Greenfield report and November, December, 1973, there has been testimony in this record that in some parts of the United States at least, shortages of supply developed in the supply of industrial gases.

Are you familiar with that?

A Yes.

Q Has there been any other change of which you are aware in any significant area of the American gases scene since the days of the Perham-Greenfield report?

MR. THURMAN: Objection.

Foundation.

JUDGE BARNES: What kind of a foundation does he need for this report?

MR. THURMAN: Does he know of any other changes?

JUDGE BARNES: Does he know of any?

MR. THURMAN: If his answer will be yes or no, I have no objection.

If he is going to start in saying something--

]

JUDGE BARNES: If he says yes, what is your objection,that he doesn't know?

MR. THURMAN: Yes.

If he says yes, there have been changes, I want to know how the -- how he knows.

JUDGE BARNES: You can ask him that on cross-examination.

MR. THURMAN: I believe, your Honor, a foundation should be given now whether he knows or not.

JUDGE BARNES: I don't think he needs a foundation.

MR. THURMAN: He was told by Mr. Topkis that there was a shortage and is asked whether you are aware of it.

I don't know if he is aware of it by what Mr. Topkis just said or if he read the transcripts.

JUDGE BARNES: I thought the questions were phrased on that he read the transcripts in this case.

Q That is a fact, is it not?

A Yes.

JUDGE BARNES: You may answer thequestion.

A Yes, I am aware of other changes.

Q Would you set them forth briefly for us?

MR. THURMAN: I make my same objection.

How is he aware?

Q All right, how are you aware of them?

A I am aware through various sources of information, from people in the industry in America, from hearing their views, from annual reports written by chairmen of industrial gas companies in this country.

I am aware of it by what I have been told by Airco.

I am aware of it through reading the transcripts of this trial.

MR. THURMAN: Objection.

I'd better wait until the next question.

BY MR. TOPKIS:

Q Did any of these changes cause any change in your appreciation of the teachings of the Perham-Greenfield report?

A Not at all.

MR. THURMAN: Your Honor, objection.

I would like to have time to object beforeyou give an answer.

The objection is it is all hearsay what he is basing it on.

The best evidence is what pepple came in,the people who told him --

JUDGE BARNES: The Greenfield report was hearsay, also, wasn't it?

MR. THURMAN: Yes, sir.

JUDGE BARNES: That's what he relied on.

MR. THURMAN: He said people told him of this stuff after the Greenfield report.

Maybe I misunderstood his testimony. I thought he was stating what he is goingto testify about he heard from people and he looked at annual reports and so on.

JUDGE BARNES: These things have caused him not to change his mind.

MR. THURMAN: This hearsay stuff has not changed his mind.

JUDGE BARNES: Wasn't the Greenfield report hearsay?

M R. THURMAN: We think it was and we don't think it ought to be in the record.

JUDGE BARNES: It is a compilation of Mr. Greenfield's the way he looked at the market.

MR. THURMAN: Opinions.

JUDGE BARNES: Opinions.

MR. THURMAN: It is hearsay and in our opinion, your Honor, should not have been admitted.

JUDGE BARNES: The question is, has Mr. Smith changed his opinions on the basis of any information that came to him and he said no.

That's proper.

MR. THURMAN: Your Honor, he said he hadn't changed his opinion and wouldn't enter the market yet he entered through Airco.

He must have changed his opinion.

JUDGE BARNES: Argue it in your brief. Maybe you got a point there.

BY MR. TOPKIS:

Q Turning your specific attention, Mr. Smith, to the questio or the matter of the shortagfes as to which there was testimony, did the existence, coming into existence of those shortages in any way change your judgment as to the validity of the Greenfield teachings?

MR. THURMAN: Objection.

When did he find out about the shortages?

MR. TOPKIS: Probably about the time --

MR. THURMAN: Mr. Topkis is suggesting this stuff to him.

Let him ask him foundation, when did you know of these shortages?

We need a little bit of foundationhere.

And I am sure if there was a shortage, it would change somebody's opinion.

JUDGE BARNES: I think if his knowledge of the shortages arose by reading this transcript, that he doesn't have any basis for it.

MR. TOPKIS: Agreed, your Honor.

I will put the question differently.

BY MR. TOPKIS:

Q In October or November of 1973 had you had reported to you that there were shortages of industrial gases in some areas of the United States?

A Yes.

Q And did those reports cause you to change your judgment as to the validity of the teachings of the Perham-Greenfield report?

MR. THURMAN: Objection.

Still no proper foundation.

By whom did they get this? Was this somebody operating over in Canada?

JUDGE BARNES: I am going to leave that to you to explore on corss-examination.

Make some notes there as to the questions you want to ask.

A No.

Q Why not?

A Because the basic objections, the basic problems facing BOC in coming to American hadn't changed.

The fact that there was a shortage in one year and a surplus in the next, that's the history of the industry.

What happens on a shortage like -- a short term like that isn't likely to change our view, which essentially has to be a long-term view.

Q Now, sir, I've asked you why had you not acquired the Airco stock, rather, you have told us why had you not acquired the Airco stock you wouldn't have thought it wize to enter the American gases field with some kind of tonnage operation.

I'll ask you why you would not have thought it wize, if that is your feeling, to enter by putting up a big plant and offering to sell gases in the merchant market?

A The number of opportunities of putting up a big plant, and by that I think to be competitive one has to look at a plant of 500, 600 tons per day, the opportunities of putting that size plant up purely to serve the merchant market and nothing else is very -- are very, very few indeed.

And there are, in fact, not very many plants, either in America or elsewhere, devoted solely to that purpose without having the base load which normally a steel works or chemical works would supply.

We couldn't possibly contemplate taking that sort of chance of expending anything up to, oh, forty, fifty million dollars, because it means in the

q merchant market, it means not simply the plant, you have to set up the whole of the distribution network, for a market where we have no place at all.

It's all the way from scratch. Commercially it is not possible.

Q All right, sir.

Now, let me ask you to discuss one more possibility that's been suggested here.

Had you not acquired an interest in Airco, would you have considered invading the American gases field from Canada?

A No.

Q Please explain why not.

A The Canadian company is a comparably small company.

It is number three in the Canadian market. And essentialy it is a distributor.

Its biggest plant is a tiny plant. It's very small indeed so far as its productability is concerned.

Now, the production costs fromthat plant are hopelessly uncompetitive when compared with the cost of producing oxygen from a large-scale tonnage plant, such as available in most industrial areas close to the Canadian border.

There is no way in which the Canadian product

can compete, particularly when you take into account the cost of freighting it from the point of production.

Canada is primarily a distribution company, of which there are many examples in the states. And there is no way in which they could, on a competitive basis, invade the American market, in quote marks.

Q As of November-December 1973, were there any companies outside the United States which had financing, technical knowlege and marketing skills in the gases field more or less comparable to BOC's which were not engaged in the gases business in the United States?

A The only ones I can bring to mind are the two German companies, Linde, AG and Messer-Greisheim.

Those two German companies possibly AGA of Sweden, though it would certainly stretch their financial resources, and I think I must qualify my answer by saying it does depend on which part of the American market they might consider they would enter.

If they had followedour analysis, of course, they wouldn't contemplate it anyway. But if they didn't, let's say they didn't accept our analysis, there is nothing to stpp any one of those three buying a distributor in the United States.

And in technological terms, and I think probagly infinancial terms, they could also come into the

bulk end.

You know my view as to whether she should or not, but they could.

Outside the Germans and AGA, clearly there are Japanese companies who could.

That names that spring to mind are Hitachi, Nippon-Sanso, and Coby is another one, another Japanese which would certainly have the resources.

But the fact is that there is no record of the Japanese companies investing in this industry outside Japan.

They have sold plants outside Japan but not i-vested in the industr-al gas industry outside Japan.

Q Referring to Messer-Greisheim, sir, would that company have any advantages or disadvantages in comparison with BOC?

MR. THURMAN: Your Honor, I have permitted this to go alongwithout foundation questions.

But I think it is about time now to stop.

There is no foundation he knows this. The questions asked on complaint counsel's case is who you considered a potential entrant.

That is not the area here. He is not in this market, certainly was not considering anybody's substantial entry.

1762

There should be some foundation of how he knows what he has been testifying to.

JUDGE BARNES: I think it is going a little far when you ask him what advantages the German company has.

MR. TOPKIS: If you will indulge me, I think they are rather obvious.

JUDGE BARNES: All right.

Q Are there any advantages or disadvantages which Messer-Greinheim would have in going into the gases business in the United States compared with BOC?

MR. THURMAN: I still object.

JUDGE BARNES: Maybe you can move to strike.

MR. THURMAN: He is saying his company couldn't come in.

Now he is saying they could.

It is inconsistent. He certainly knows about his company but hasn't given any foundation as to what he knows about these other companies.

JUDGE BARNES: You may move to strike.

It depends on his answer.

A The advantage which Messer-Greisheim would have, compared with our position is that they are two-third owned by Horchest, which is the largest chemical company in the world and they have enormous resources behind them.

Q How about Linde, sir? Is there anything in their sturcture or experience which would cause them advantages or disadvantages compared with BOC?

A Yes.

I think the advantage which Linde would have compared with BOC is that they have for many years now had a plant company operating here in the states and have indeed installed and built a number of air separation plants in America.

And they have a well-established acceptance of their plant here in the states.

And to that extent I think they would havean advantage.

Q Does Linde actually have an office here in the United States?

A Yes.

Q For the selling of plants?

A Yes.

Q Now, going to steel companies --

MR. THURMAN: I would think thatwe move to strike.

JUDGE BARNES: I think you have -- you should have a background question on the Linde office, as to how Mr. Smith knows.

BY MR. TOPKIS:

Q Could you tell us the basis of your knowledge, Mr.

Smith?

How do you happen to know Linde has an office here in the United States?

A They told me.

Q Linde told you?

A Yes.

Q That is the compan y you fight with around the world, isn't that a fact?

A Yes.

MR. THURMAN: Mr. Topkis keeps putting testimony here, fighting with them around the world.

There is no evidence they gight with them around the world or they are even anywhere around the world.

JUDGE BARNES: I think that remark should be stricken from the record.

I will also strike Mr. Smith's answer as to the Linde office and what it does if it is merely hearsay.

I think there are better wasy of proving that.

MR. TOPKIS: There are, and I will develop them.

JUDGE BARNES: How long would you say we are going to be going on, Mr. Topkis?

MR. TOPKIS: I could conclude with Mr. Smith and I should say depending on the frequency of objection, possibly in half an hour at the outside.

1765

JUDGE BARNES: Off the record.

(Discussion off the record.)

JUDGE BARNES: On the record.

BY MR. TOPKIS:

Q Mr. Smith, turning now to steel companies, I would like you to tell his Honor whether at various points around the world, steel companies are engaged in the gases business.

MR. THURMAN: Objection. No foundation.

MR. TOPKIS: If the witness know.

MR. THURMAN: We want to know how he knows.

BY MR. TOPKIS:

Q Would you tell his Honor and Mr. Thurman whether you know and how you know whether steel companies are engaged in the gases business at any points around the world?

A I do know and I know because we are in competition with them.

Q Would you tell us where those situations are and how they have arisen?

Tell his Honor about them if you will.

A Yes.

The two places of which I personally know are first of all in South Africa, where our main competitor is jointly owned between air products and Iscor, which

1766

is the state-owned steel company in South Africa.

MR. THURMAN: What's the name of that?

THE WITNESS: It's at the -- it's the state-owned steel cmpany in South Africa.

Secondly, in Australia, where BHP, which virtually i is Australian steel, where BHP has negotiated an arrangement with Linde of Germany whereby there will be a joint marketing operation of oxygen from the BHP plants.

Q So that will be a merchant marketing, is that right?

A That's right.

Q Going back to the South African situation, sir, this joint venture between the steel company and the air products, is that in the tonnage business, the merchant business, both, or what?

MR. THURMAN: I am willing to listen to this. I don't see the relevancy, your Honor.

We are talking about the United States markets and United States steel companies.

I see no relevancy to what they do in Afrida, unless there is some correlation that he knows that the same situation would be true in this market.

JUDGE BARNES: Do you know of any correlation that says it wouldn't be true?

MR. THURMAN: I don't think that's our burden.

I think the burden is on them to show that something is relevant to this particular market as

alleged.

JUDGE BARNES: I think in this instance where there is a gas company associated with the steel company --

MR. TOPKIS: In Africa, yes, sir.

JUDGE BARNES: In Australia.

MR. TOPKIS: Well, the witness --

Q Is Linde associated or are they just supplying the plant?

A No, no.

It is a joint marketing company.

Q Very well.

I will go then to Japan. Would you tell his Honor the arrangement in Japan, if you are familiar with it?

And please tell Mr. Thurman how you know about it.

And please tell Mr. Thurman how you know about it.

A There are many reports.

I hesitate to say that so many of these things are common knowledge in the industry, but that is the truth of the situation.

Many of these things are common knowledge.

But so far as the Japanese market is concerned, there are numerous reports, apart from one's personal

knowledge of the situation.

The industrial gas market in Japan is totally differently structured from that anywhere else in the world.

MR. THURMAN: Excuse me for interrupting. But his reports and such, it is certainly best evidence. It is hearsay as far as I'm concerned. Certainly he doesn't have first-hand knowledge on what's reported.

JUDGE BARNES: I think we would need a foundatio here, has the company made a study of the Japanese market into the market there, and so forth.

BY MR. TOPKSI:

Q Does your company regularly keep up to date on developments in the gases business around the world?

A It has to.

Q You maintain so-called corporate intelligence division?

A Yes, indeed.

Q Is it their job to keep you informed of such developments?

A All the time, yes.

Q And have you received reports from that division relating to the Japanese situation?

A Yes, I have.

Q And you rely on them?

7065

29

A Yes, I do.

Q And they are not contradicted or -- by any other reports?

A No, they are not.

MR. THURMAN: We would like to see those reports.

MR. TOPKIS: Go to London.

Q Please answer the question.

JUDGE BARNES: Mr. Smith can testify as to things of his personal knowledge.

You had witnesses on your case in chief who sat up on the witness stand and testified to sales figures and things like that and they didn't have their books and records there.

If he has personal knowledge and reports from the Japanese market, he can testify to his understanding of the Japanese market for whatever relevancy it has.

I hope you will develop that.

I will overrule your objection.

THE WITNESS: Yes, the Japanese industrial gas market is structured differently from anywhere else in the world.

Fundamentally it is fed by tonnage plantswhich are owned by the steel companies.

And it's the steel companies themselves who are operating those tonnage plants in the first place to

take off their requirements for their steel-making purposes, but then to go on to sell the spare liquid that is produced straight into the merchant market and the contrd of the Japanese industrial gas market is in fact in the hands of the steel makers and not in the hands of the industrial gas company.

Q Now, going to other gases than air separation gases, sir, are those-- well, let's take carbon dioxide for exampl,e in Britain, who are your principal competitors in the carbon dioxide business?

A We ourselves are not producers of carbon dioxide.

We only market carbon dioxide and then on a very small sfcale.

The major producer of carbon dioxide in UK is ICI, and thd major distributor of carbon dioxide in UK is Distrillers Company.

Q How about carbon monoxide, sir?

MR. THURMAN: Your Honor, I will object now.

Here again I am willing to listen to this but what's the relevancy of UK who produces?

MR. TOPKIS: The relevancy is this and only this:

At various points around the world, specifically in so famous an economy as Britain, various chemical companies have found it within their capacity and field of

interest to manufacture and sell industrial gases.

It is our submission here that American chemical companies both are in the business and also are potential entrants into the business.

JUDGE BARNES: I think that's his argument, that the steel companies are potential entrants into the U.S. gases market.

MR. TOPKIS: Right, sir.

JUDGE BARNES: You will argue they are not.

MR. THURMAN: Certainly.

This is going around Robin Hood's barn trying to get some analogy from a Japan company where he says it is completely differently structured.

Mr. Topkis said he would help us on ourcase and I would help him put on his case to bring some steel companies into show what studies they made and several steel companies, that they are interested in this market and going to enter into this market, and whether they are sitting on theedge of the market.

JUDGE BARNES: Well, there might be better ways of proving that thd U.S. steel com panies are potential entrants in the way he is going about it, but certainly the testimony is relevant.

So I will permit you to proceed.

MR. TOPKIS: I will be very brief, your Honor.

32]]

BY MR. TOPKIS:

Q ICI and the other company you mentioned, are they normally gases companies or principally active in some other thing?

A ICI is a chemical company in the main and the Distillers Company are the biggest whiskey producers in the world.

JUDGE BARNES: Now we are getting into our relevancies.

Q ICI, by the way, is engaged in operations in the United States, isn't it?

A Yes.

Q Chemical operations?

A Yes.

Q Let's hurry on before Mr. Thurman asks you how you know.

How about hydrogen, sir, who are the largest manufacturers of hydrogen in Britain?

A Probably ICI, but there are a number of chemical companies iq the production of hydrogen.

We produce some ourselves. Staveley, a company called Armourhess, those are the biggest.

We distribute some but there are several who distribute as much as we do.

Q And those companies you mentioned, they also sell

33

hydrogen?

A Yes.

Q So far as carbon monoxide is concerned, are there any chemical plants -- companies in Britain who manufacture it?

A Yes, we don't manufacture any ourselves.

We sell a bit as part of the range of gases. But there are a number of chemicals companies who make and sell carbon monoxide.

MR. TOPKIS: Now, your Honor, I'm going to go briefly to the medical area.

I would say twenty minutes, maybe.

If you want to break, I will be glad to. But I will do whatever your Honor wishes.

JUDGE BARNES: Let's break for the day. It is five o'clock and we will meet tomorrow morning at 9:30.

MR. TOPKIS: Very well, your Honor.

(Whereupon, at 5:00 p.m. the hearing was recessed until 9:30 a.m., June 7, 1974.)

I N D E X

Witnesses	Direct	Redirect	Recross
Leslie E. Smith		1881	~~1892~~
Vincent Giordano	1894		

E X H I B I T S

Airco's	Evidence
RAX7	1896

oOo

BEFORE THE

FEDERAL TRADE COMMISSION

In the Matter of:

BRITISH OXYGEN COMPANY, LTD., BOC FINANCIAL CORPORATION, BOC HOLDINGS, LTD., BRITISH OXYGEN INVESTMENTS, LTD., AIRCO, INC.

Docket No. 8955

Hearing Room D
26 Federal Plaza
New York, New York
Wednesday, June 6, 1974

Met, pursuant to notice, at 9:30 a.m.

BEFORE:

ERNEST G. BARNES, Administrative Law Judge.

APPEARANCES:

K. KEITH THURMAN, GORDON YOUNGWOOD, DON PURCELL, DARYL NICKEL, RHETT KRULIA and JOHN HOAGLAND, on behalf of the Federal Trade Commission

JAY H. TOPKIS, LEWIS A. KAPLAN and MOSES SILVERMAN, Paul, Weiss, Rifkind, Wharton and Garrison, 345 Park Avenue, New York, New York, 10022, on behalf of respondent, British Oxygen Company, Ltd.

FOSTER WOLLEN, R. BRUDE MAC WHORTER and DANFORTH, NEWCOMB, Shearman and Sterling, 53 Wall Street, New York, New York 10005, on behalf of respondent AIRCO., INC.

ROBERT L. DOAN, Assistant general counsel, Union Carbide Corporation, 270 Park Avenue, New York New York, and ALEXANDER W. SIEROK, Wald, Harkrader and Ross, 1829 19th Street, N.W., Washington, D.C., 20938, on behalf of Union Carbide Corporation

JUDGE BARNES: We are ready to proceed.

MR. TOPKIS: Fine, Your Honor.

LESLIE EDWARD SMITH

having been previously duly sworn resume and testified further as follows:

DIRECT EXAMINATION CONTINUED

BY MR. TOPKIS

Q Mr. Smith, I forgot to ask you a question with reference to the question of gases.

At or about the time the Perham Greenfield inquiry was being made, was there any other investigation of possible areas of exploitation or development by BOC?

A Yes, there was.

Q Would you tell us about those, please?

A They were confined to parts of the European market, in particular, Germany and the low countries.

Q And were the findings of those studies reflected in the allocation of priorities which we saw in an exhibit yesterday?

A Yes.

Q Turning to the medical side, sir, we have seen earlier in your testimony that something called Medishield, Limited, a gathering together, an international enterprise was set up and I would like to ask you about the United States part of your operation.

Perhaps the most open-ended way and non-leading way in which I can do that would be to ask you, would you please tell us the history of your involvement with a company called Harris Calorific and subsequently, Harris Lake?

A Yes. Our association with Harris Calorific goes back thirty years or more. There, too, we had a cross-licensing arrangement --

Q Forgive me for interrupting. But, Harris Calorific was an American company?

A Yes.

We had a cross-licensing arrangement on certain types of light industrial equipment, this is welding and cutting equipment, hand torches and that sort of thing.

Q What was the business of Harris Calorific?

A Harris Calorific was entirely in the business of industrial equipment, gas equipment, equipment for the application of gases either in cutting or welding.

Now, the association was quite a close one and the point was reached in the early sixties about 1963, when a fair sized slice of the Harris Calorific equity came on to the market. I don't know how much of the detail you would like as to how that happened.

Q No, no need to go into that.

A portion of its stock became available?

A Yes, indeed. Some 23 percent, in fact.

The chairman of Harris Calorific at the time, one Mr. Taylor, contacted his friend in London who was our managing director, Mr. Tom Potts and said that he thought that BOC might be interested in buying this stock as a means of further cementing the association between the two companies.

In fact, I was dispatched out to the States to negotiate that purchase, which I did. From then on, it did have the effect of bringing the two interests in this part of the business, in welding equipment, a bit closer.

We took no part in the management of Harris Calorific but we did appoint one of our people to the Harris Calorific board, to wit, one Mr. Allen Perham, who was, at that time, president of Canox and in fact, that was the situation until late in 1973.

Q You told us that the business of Harris Calorific was cutting and welding equipment?

A Yes.

Q Were you in the UK -- you spoke of a cross-licensing arrangement. Were you selling any Harris equipment --

A We were selling Harris designed equipment under the BOC name.

Q Did there come a time when Harris Calorific got into some aspect of the medical equipment business?

A Yes, they did. This would be around 1964, '65 when they were looking for a means of exploiting their skills in light engineering and concluded that some aspects of the medical market would be of interest to them, which they could sell. In fact, they contacted us as to whether there were any parts of our business on the medical side which they could use and indeed the arrangement was made that they would assemble and sell our Boyls table.

The Boyles table being the table used in anesthesia and which all the gadgets are hung for use by the anesthetist.

They became our agents, in fact, in the United States, for the sale of the Boyles table.

Q Were the Boyles tables that they were selling manufactured in the UK or how were they put together?

A Originally, all the parts were made in the UK and sent to the States where they were assembled. Subsequently, a good many of these parts were subcontracted by Harris Calorific to companies in the United States.

Q But, for some time, all they did was assemble?

A That's right.

Q Now, you said matters interms of relationship between the two companies continued after Mr. Perham took his seat on the board. Can you track that story down to the present?

A Yes.

The early years of their attempt to get into the medical market, medical equipment market weren't easy. There were some years of difficulty, I think, much caused by BOC in the supply of parts.

After some three or four years and very much with the assistance of Mr. Perham, they were able to put together a marketing effort for the sale of the Boyles table.

I think the next step of any significance was when I was advised by Mr. Steve Taylor who was the president of Harris Calorific -- let's see -- this would be probably around May or June of 1973, when he advised me that he had been approached by a company called Emerson, Emerson Electric, who had said that --

Q Excuse me. Before we get to that, sir, did there come a time when Harris Lake was formed?

A Yes, I beg your pardon. I ought to go back a step.

Again, I am a bit hazy about dates. But, certainly not more than two, possibly three years ago, what happened was that a company by the name of Forregger, was purchased by Air Products and the man, who at that time was running Forregger, a Mr. Lake, decided, for awhile, that he would prefer not to stay in that position and look elsewhere.

In the course of him looking elsewhere, he approached Harris, Harris Calorific, since he knew of the growth which Harris had in the medical equipment field. To cut a long

story short, it was agreed to form the medical side of Harris into a separate organization called Harris Lake, which Mr. Lake would run and in fact, Mr. Lake took part of the equity of that company.

So, that was the situation when I was advised that Emerson wished to acquire the stock of Harris Calorific and our reaction was to say, well, we don't want to act in any sort of dog-in-the-manger attitude on this approach. If this is what the Harris board and the Harris management wants, okay, we woud go along with it and vote our 23 percent interest. But, in doing so, we would very much like, if at all possible, to keep to one side, the Harris Lake activity because it was the arm through which we were selling and they were our agents for the marketing of the Boyles table.

There was, to say the least of it, some doubt as to whether that agency arrangement was exclusive. In other words, there was some doubt if, in fact, Harris Lake had gone into Emerson, whether we, in law, would have been allowed to appoint another agent for the sale of the Boyles table and that was the real significance to us of requesting that if possible, we should keep Harris Lake out of the field.

Of course, Mr. Lake himself had something to say in this, because he, in fact, not only had part of the equity,

but written into his agreement was a first option to buy, should any further Harris Lake shares become available.

To cut a long story short, what then happened was that Emerson bought Harris Calorific and sold Harris Lake back to BOC and Mr. Lake, in 1973, November of 1973.

Q Just before the Airco deal?

A Just before. About a week or two before the Airco tender.

Q Do you remember what you paid for Harris Lake?

A Yes. We paid two million dollars, of which, much the major part was good will.

Q Do you happen to remember the figure?

A My memory tells me that the assets purchased were $600,000.

Q Now, sir, I would like to do for his Honor as to the enterprise called Fraser Sweatman, what you have just done for Harris Calorific and Harris Lake. Tell your story.

A Fraser Sweatman, Canada and Fraser Sweatman USA, both are very small subsidiaries of a British company called Cyprane, Limited.

Now, again, we had had a fairly close association with Cyprane extending over some years. There were two main reasons for this: The first is that we were buying a large proportion of the Cyprane vaporizer output which we were then selling, sometimes by attachment to our

Boyles table, all around the world. And secondly, two of the guiding lights behind the Cyprane development were ex-BOC people whom we had known for quite some time.

The original discussins which we had were with Fraser Sweatman who held a majority interest in Cyprane Limited and with an organization called ICFC which is a finance company for industry. It is the industrial something finance corporation.

Anyway, its purpose is to provide finance to industry in Britain. It is a private organization. It is not a governmental organization, who held some 30 percent interest of the Cyprane stock.

Now, the negotiations were difficult and protracted because, in effect, we were dealing with two parties, Fraser Sweatman himself and ICFC and we had some difficulty in bringing them together.

The original basis on which we negotiated was that we would buy the Cyprane UK Company that is where all the manufacturing of the Cyprane vaporizers takes place, the two little Fraser Sweatman companies were assembling shops--

Q You mean Fraser Sweatmen Canada and Fraser Sweatman US?

A Yes. Our main concern was the manufacturing which involved the development of prices and the development of any new technology.

The original theory was that we would take only a small interest in the two companies because Fraser Sweatman, as a Canadian was concerned with keeping some interest in those two companies and our interest was primarily the UK end.

However, it wasn't to be because during the course of those negotiations, other people came into the picture and the one I knew about at the time was the American Corporation, G. D. Searle and I have heard it said, I don't know whether it is true, but I heard it said that Chemetron was involved. And finally, it came down to the parties interests of putting in a closed bid for the whole Cyprane business. We did that and our tender was accepted.

Q So, you bought the whole of Cyprane including the two Fraser Sweatman subsidiaries?

A That's right.

Q Was there any one price allocated to the one Fraser Sweatman US operation?

A I don't think so.

Q Now, as of the present time, you own in the United States, a company called Harris Lake; is that right?

A Yes.

Q And you own in the United States, a company called Fraser Sweatman?

A Yes.

Q Do you own any other interests in the United States engaged in any aspect of the medical equipment business?

A No.

MR. TOPKIS: Your Honor, perhaps in the interests of orderliness, I could call Your Honor's attention to the stipulations which were offered yesterday by Commission counsel which revealed that the sales of Harris Lake last year were a million eight hundred seventy-three thousand dollars. The sales of Fraser Sweatman, US were two million three hundred eighty-three thousand dollars. And in addition, CX328 reveals that BOC sold itself to third parties in the United States in the last fiscal year, $73,876 pounds of medical equipment merchandise of all kinds. Seventy-three thousand pounds would be about $175,000 or something on that order.

Q Is that correct, sir?

A Yes.

MR. THURMAN: Your Honor, I think we will go through this again today. I have been overruled but I think it is improper to read what is in the record. It is a matter of briefing at the end of this case.

JUDGE BARNES: Well, as I have said yesterday, it is proper for him to call my attention to specific

things in the exhibits if it is part of the presentation of his case. It is helpful to me and I think it is proper.

I overrule your objection.

MR. THURMAN: Complaint counsel never stated that sales were a hundred million or something like that. I see no reason in pointing it out.

If it is there in the record, it is there.

JUDGE BARNES: He apparently does see a reason for it. You disagree with him and it is not legally improper to do it.

MR. THURMAN: I have been reprimanded for doing this sort of thing in the past.

JUDGE BARNES: You have probably been reprimanded for reading an exhibit into the record but I see no problem with calling the Judge's attention to a specific part of a document.

BY MR. TOPKIS:

Q Now, sometime in the recent past, something called Medishield was formed in the United States; is that right?

A Yes.

Q Would you tell us about that, please?

A Yes. Medishield, Inc. --

Q That is the --

A The American company, a subsidiary of Medishield Limited in the UK, the international holding company. Medishield was formed merely as a vehicle to collect together the interest we did have both in the States and in Canada.

In other words, Fraser Sweatman was Canada, Fraser Sweatman USA, Harris Lake, plus the medical equipment business of Canadian Oxygen.

It has not yet completed the process of bringing those companies together but the corporation has been registered and I think that is as far as we have gone.

Q As of November, 1973, sir, just before the Airco acquisition, let's put it in time precisely between the date you acquired Harris Lake and the date you acquired the Airco stock, did you have any plans for the expansion of your US operations in the medical equipment business or, contraction --

MR. THURMAN: Your Honor, this is a conclusion. Your Honor will draw from what is in the record.

For this witness to say that they had no plans to expand, on its face will not be accurate.

Anybody will expand a business if they are int it and the record shows it. Why get a statement now to offset some extemporaneous documents and Your Honor will draw --

JUDGE BARNES: You want me to exclude his testimony?

You don't want his testimony in the record because it is not favorable to your side of the case, is that it?

Am I supposed to exclude his testimony and prohibit him from testifying as to what his business plans were?

He is the chairman of BOC and he is entitled to testify. Your argument is that I should not give any weight to his testimony.

MR. THURMAN: We might argue later that this is a conclusion that Your Honor would draw from what is in the record or if he had plans, to submitsome plans. Either way, plans not to expand or plans to expand.

All through the case in chief, we heard the best evidence rule and I don't know if Your Honor remembers or not, I hope you do --

JUDGE BARNES: I have a pretty good memory --

MR. THURMAN: If there is a document, you don't ask a witness the question. You put the document in. This was Mr. Topkis' misinterpretation of the best evidence rule. We were forbidden to ask witnesses questions if there was a document involved. So, if there are documents, we would like the best evidence and not to ask the man

orally.

JUDGE BARNES: You can ask him on cross-examination if he has any reports or plans. You can do it on cross-examination. I know of no rule that will permit me to exclude his testimony on these points.

MR. THURMAN: I agree but I know of no rule where Mr. Topkis says we can't ask a witness a question when there is a document which says that.

JUDGE BARNES: It depends upon whom you are asking the question of. If you are asking it of a third party, it is not relevant. It is not relevant to what Linde has planned, that is not relevant in this case.

If you think my rulings are wrong and having Mr. Topkis call my attention to exhibits is wrong, if you think the rest of them are wrong, you bring me in some decisions and I will reconsider. But, I know of none now.

Proceed, please.

THE WITNESS: May I have the question again?

MR. TOPKIS: Surely.

May I rephrase it, Your Honor?

JUDGE BARNES: Yes.

BY MR. TOPKIS:

Q Between the date of your closing of the Harris Lake transaction and your making of the Airco tender offer, did you have any expansion plans for your medical activities

in the United States?

A There was certainly nothing that occurred between those two dates which altered any existing plans in Medishield.

Q Putting yourself back to that point in time, would it have been your expectation that you would have expanded or contracted your medical business in the United States if you had not bought an interest in Airco?

A We had certainly hoped to expand it.

Q Did you have any plans to expand it at the time?

A Medishield had plans. The Medishield management and board had plans to expand the existing Canadian and American interests. Those plans, of course, had not yet reached the BOC board which was the ultimate authority of the direction in which those plans should be achieved.

Q I see.

No investment proposals had been made to the BOC board?

A None. And, of course, it is the BOC board that has the final authority on any investment proposal in this field.

Q Had any such proposals or specific plans reached you personally as chairman?

A I had had copies of some of the planning documents which Medishield put together and, frankly, I hadn't taken

too much notice of them because I knew that when it came to the crunch, and there was a specific acquisition proposal, it was at that point that I got really interested.

Q That is your usual practice, you mean?

A Yes.

Q I see.

Now, as of that date, did you have any information as to what might be possible areas of expansion of your medical equipment business in the United States?

A Yes. I think the area which was really uppermost in the minds of the Medishield people was the prosthetics field.

Q What do you mean by "the prosthetics field," sir?

A These are the artificial plates and joints which are being used, increasingly, for the relief of rheumatism, arthritis and that sort of thing.

Q By surgical implant, you mean?

A Yes. This was an area in which we believed we had some lead on the competition. We knew that from all appearances, from all studies, it was a high-growth area and certainly, the highest growth part, so far as we could detect, of the whole of our medical interest. I think it is fair say that most of the interest, most of the enthusiasm surrounded this prosthetics area, not just in Britain but in America and Canada too.

Q You have selected somebody to head Medishield US?

A Yes.

Q Who was that?

A Mr. Bill Moeller.

Q What was Mr. Moeller's prior experience?

A He had previously been with Howmedica. He had left them for a number of reasons but, I think what most attracted us to him was, first of all, his job in Howmedica had been the development of the prosthetics market and secondly, he was obviously a highly energetic and intelligent manager.

MR. TOPKIS: Just a moment, if I may, Your Honor.

JUDGE BARNES: Mr. Smith, let me ask you, how many countries of the world do you sell medical equipment in, right now?

THE WITNESS: It must be anything up to 60.

JUDGE BARNES: Is that where you sell industrial gases?

THE WITNESS: Yes. But, also, from there, into countries where we are not necessarily on the ground with industrial gases.

JUDGE BARNES: Can you tell me what percentage of your company's sales are medical products?

MR. TOPKIS: If Your Honor please, I think that is in the BOC annual report. I can call it to your

attention, if I may have it for a second, Your Honor.

JUDGE BARNES: Yes.

THE WITNESS: I was going to guess five percent.

MR. TOPKIS: I think the figure is about nine percent, Your Honor. But, it includes medical gases. That is why the witness is in error.

JUDGE BARNES: What are the principal medical products that you sell?

THE WITNESS: On the gases side it is medical oxygen and nitris oxide. Then in most countries where we are on the ground with gases, we do a pipeline business, fitting the hospitals with pipelines for the use and distribution of oxygen around the wards and hospital rooms.

On the medical equipment side, it is nearly all anesthesia and oxygen therapy equipment. There is not a great deal that we do outside of that.

Prosthetics is still a tiny part of it.

BY MR. TOPKIS:

Q What is the fastest growing part of your medical equipment business?

A Prosthetics.

Q As of November of 1973, Mr. Smith, as you have thought about the possibilities of developing your American medical equipment business, did you envisage any opportunities or difficulties in the role of such

development?

A Yes. We thought there were both opportunities and many difficulties.

Q Could you tell His Honor a little bit about that?

A I think the opportunities lay mostly in the prosthetics field. In fact, that we felt we did have some advantage in the development of the product. It seemed to us that our product was certainly as good as anything available elsewhere and maybe we even had a slight edge.

Difficulty, yes. We knew there were enough difficulties. I think perhaps the major difficulty which we all recognized was the quite natural but also quite inate conservatism of the medical profession.

It is quite natural, I think, that practitioners, surgeons and so on would stick with what they know, rather than take a chance. After all, they are working with people's lives and so on and if they have an established product or an established process, one which they may well have learned in the course of their progress through medical college and so on, that naturally, they are going to stick to it if they can. It takes a considerable effort but I don't say it is any different in the American market from anywhere else. It is much the same everywhere.

It takes a considerable effort to persuade medical practitioners, surgeons and so on, to try something

different. It is avery natural and human reaction. But, it is inate and it is throughout the world, no doubt.

Q In terms of possible acquisitions in the American medical equipment business, sir, did you see any difficulties in your path there?

A I think the main difficulty in that direction was the practical one of the very high cost of acquiring medical businesses in the States. They sell at price earnings ratios way above the average and way above the average for any manufacturing company.

Q To your knowledge, as of November-December, 1973, were any companies, any large companies bidding for medical equipment companies?

A This has been a pattern, in fact, of the last three to five years and it isn't restricted only to the American market.

The fact is that there is going on the world, a regrouping of the total medical health and welfare market whereby the large corporations are taking unto themselves many of the smaller people.

Q Can you name for his Honor some of the large corporations which have come into this field?

A Well, one I have already mentioned, G.D.Searles.

Q What is Searles principal field of endeavor?

A It is in pharmaceuticals and many aspects of hospital

supplies and that sort of thing. To my knowledge, they bought three British companies in the last fifteen months, the last one being Cold Cross Supplies, London and as I have already mentioned, they were in competition with us in the purchase of Cyprane.

They have purchased companies in most of the continental countries.

Q Any in the US, to your knowledge?

A I don't know. But, I don't doubt that the pattern is the same.

Another such comapny is Pfiser, the pharmaceutical company. They have been expanding by acquisition in this field.

Q Any other companies?

A Howmedica is another company which itself has been purchased.

Associated Hospital Supplies is another. There are also, I am aware, one or two fairly large American conglomerates who have identified this particular area as being one in which they would wish to expand.

Q Can you name some of those conglomerates?

A International Utilities is one that I happen to know of.

Q Any others?

A I can't call them to mind offhand.

Q Have you heard the name of the Chicago based company CNA?

A Yes. They have moved into the field of distribution of dental supplies, in a very substantial way. They, incidentlly, were an insurance company, I think they still are.

Q Yes. They are all over the Wall Street Journal these days for various reasons.

How about General Electric?

A Yes. General Electric has a very large side to their--their medical activities has grown rapidly, by acquisition.

Q Any other pharmaceutical companies?

A None that I can bring to mind but I am sure there are because this is apattern which exists throughout the world.

Q Now, sir, referring to Searles, Pfiser, General Electric, American Hospital Supply, International Utilities and CNA, could you compare them in resources with BOC?

A Not easily because, for instance, at one end of the scope, General Electric is very much larger than BOC and at the other end of the scale, one or two are about the same size, if you measure it in terms of total turnover or --

Q So, they range in size from much larger to about the same as BOC?

A Thats correct.

MR. TOPKIS: I have no further questions of Mr. Smith.

Thank you very much.

You may inquire.

JUDGE BARNES: Shall we take a five-minute recess?

(Whereupon a recess was taken.)

JUDGE BARNES: Backon the record.

CROSS EXAMINATION

BY MR. THURMAN:

A Did you attend the hearings in Washington, Mr. Smith?

A Part of the time, yes.

Q How many days were you present?

A Two and a part of the third day.

Q How many witnesses didyou hear testify?

A Four.

Q Who were they?

A Mr. Loveman of Burdett Oxygen. Mr. Demster of L'Air Liquide, the gentleman from the south, I don't remember his name.

Q Mr. Hines?

A It might have been Mr. Hines. It is the gentleman whose father had decided to get out of the business and he had sold his business subsequently and he had met one BOC man once on a golf course.

Q Mr. Hines.

A Mr. Hines.

And one other gentleman who appeared on the same day as Mr. Hines. I can't recall his name. He was also in a small industrial gas business.

Q Did you read the transcripts in this case?

A Yes.

Q All of them?

A I have read them all up until the end of the hearing in Washington.

Q Were you present when Dr. Moeller testified?

A Yes, I was.

Q Mr. Smith, you referred to BOC's industrial gas business, several times, I believe; is that correct?

A Yes.

Q What is BOC's industrial gas business?

A We include in our thinking as to what composes industrial gas, the air separation gases which are oxygen, nitrogen and argon. They also include as special gases, the other elements of separated air which are cripton and xenon, although it is conducted as part of the industrial gases, it is a separate sector of that business.

We also include some fuel gases, the major one in our case being acetelene. We include carbon dioxide, we include helium, we include a number of gases which we

dont' necessarily make ourselves but distribute like carbon monoxide, the range of quite insignificant gases of that kind like sulphur dioxide and so on.

JUDGE BARNES: I didn't hear you mention hydrogen.

THE WITNESS: That is another one, yes.

JUDGE BARNES: Who makes carbon monoxide?

THE WITNESS: In the UK it is made by a number of chemical companies but we distribute it.

BY MR. THURMAN:

Q Which of the industrial gases are produced by BOC?

MR. TOPKIS: Where?

Could we know that, Your Honor?

Q Well, do you produce different gases in different areas or do you produce the same?

A No. We produce the same everywhere except in carbon-dioxide which we don't produce in the UK but, is produced by some of our companies outside the UK. Otherwise, we produce all the air separation gases.

We produce acetelene. We don't produce helium, of course, but we sell it. We don't produce carbon monoxide but we sell it. We do produce hydrogen and sell it.

Have I left any out?

Q You stated, I believe, that carbon dioxide you don't produce but you sell. Any other gases that you don't produce but sell, industrial gases?

A Yes. Carbon monoxide is one such.

Q None of your subsidiaries produce --

A No.

Q What percentage of BOC's shipments of industrial gases are accounted for by the air separation gases?

MR. TOPKIS: Is this around th e world?

Q I believe you said you produce the sames gases around the world except for carbon dioxide which you produce in some areas?

A Yes. Well, if I take the UK market as an example, the air separation gases probably account for something like 60 percent of the total industrial gases.

JUDGE BARNES: Is that dollars, pounds or --

THE WITNESS: Pounds, money.

JUDGE BARNES: Who produces helium?

THE WITNESS: In this country, Airco is far and away the biggest producer. There are other sources of helium coming into the market. One in Poland andone in Algeria. This comes out of the ground.

JUDGE BARNES: Helium is from the ground?

THE WITNESS: Oh, yes. When you sink a hole in the ground for the exploration of oil or gas, if your lucky, what you will find is that it contains some helium and, really, a concentration of anything above 2 or 3 percent makes it exploitable commercially.

I should have added that until the Polish and Algerian sources became available, there was one other place from which helium was taken and that is a very small plant up in Canada, in Sasskatchwan, in which we had an interest.

Q If air separation products represent only 60 percent, is there any other gas which represents a large part of your business?

A Yes, acetelene.

Q What percentage of your business would that be?

A That must be about ten or twelve percent.

Q Why do you market gases that you do not produce?

A For two reasons: A, because we can make money out of it and B, the customer finds it convenient to draw all his requirements from a single supplier.

Q Now, BOC got its origin where?

A I beg your pardon?

Q BOC, got its origin where in producing and selling --

A Its origin goes back in time to a company called Brins Oxygen, which was a Scottish company and it goes back to the end of the last century. It produced oxygen by a process which long ago ceased to be commercially possible. It produced oxygen in those days and most of it was for theatrical lighting, But, in grew from that very humble origin into BOC.

Q That was in the United Kingdon?

A Yes.

Q When did BOC extend its industrial gases business beyond the United Kingdom?

A The first step, in fact, were in Australia and South Africa which go back to the early twenties.

Q How was this extension accomplished?

A It was started from a couple of fellows going out to Australia and South Africa with a bit of money supplied from London, setting up a small plant. We're talking about a very tiny market in those days, mind you.

Q What was the next expansion?

A The next expansion, chronologically, was in India where a company was set up which, in fact, was designed to serve not just India but Pakistan, which was also India in those days before the partition. As well as Singapore, Malaya, Hong Kong and the splitting up of that company into its component parts as we know it today, took place in the late 1940's, early 1950's.

Q How was that entry accomplished?

A That entry was accomplished by the same process. By sending a couple of chaps out with a bit of money and the technology.

Q Were any other entries, expansions in industrial gases from that time until you came with the company in 1956?

A Yes. Expansion had taken place in Canada which started just after the last war.

The African company had, in the meantime, spread into East Africa and Rhodsia. That too was split up subsequently into three separate companies. There was a Zambian company which was also part of that original company which was split up.

Other places into which some of our subsidiary companies split up include Indonesia, Thailland, Fiiji, New Guinea, Philippines and so on.

Q Going back to your business in the United Kingdom, did you sell throughout the United Kingdom or do yousell in certain portions --

A Throughout the United Kingdom.

Q Why do you sell throughout the United Kingdom?

A Because we find it profitable so to do.

Q Now, I believe you testified that you went into Canada after World War II or in the forties?

A Yes

Q How did you enter the Canadian Market?

A We entered the Canadian market by sending a man out from London with a bit of money and a bit of technology and he opened a small shop and that was the origin of it.

Q Did you start producing industrial gases there at that time?

A That's right.

Q What size plant did you have at that time?

A From memory, it was about a hundred meters, a tiny, tiny plant.

Q What percentage of the market did you have in the first year at that time?

A Nil.

Q What percentage of the market do you have today?

A We are talking about total market including tonnage, are we?

Q Yes.

A Eight or nine percent.

Q I believe you testified that this was the number 3 company in the Canadian market?

A Yes.

Q Now, how many countries did the BOC group produce in the market of industrial gas at the time you joined BOC in, I believe, 1956?

A I'm sorry, I can't recollect that. I can look it up and let you know, if you wish.

We were certainly operating in the UK and Ireland, of course, in South Africa, Rhodesia, East Africa, o Australia, New Zealand, New Guinea, Singapore, Hong Kong, on the Malayan mainland, India, Pakistan and Canada.

Q Were all of these entries through De Novo entry,

internal expansion?

A No.

Q Which were D'Novo?

A The UK was D'Novo, so was Ireland, South Africa, the start was D'Novo as it was in Rhodesia, Zambia, East Africa.

In Australia, the start was D'Novo as it was in New Zealand. In New Guinea it was an acquisition. In India it was D'Novo as it was in Pakistan. In Hong Kong it was a tiny acquisition. In Singapore it was D'Novo. In Canada it was D'Novo.

Q What size plants did you start out with in these various countries?

A Tiny plants, all very small ones.

Q Now, you made an acquisition in New Guinea, what share of the market did this company have at the time that BOC acquired them?

A Something like thirty or 35 percent.

Q What percent do they have today?

A Since then, they have added an acquisition to it and they have something like 60 percent.

JUDGE BARNES: Where is this?

THE WITNESS: In New Guinea.

JUDGE BARNES: It is not a very big market, is it?

THE WITNESS: No, it is tiny. It is about a

tenth of the Australian market, if that helps.

BY MR. THURMAN:

Q How about Hong Kong?

A Well, in Hong Kong, the operating company is owned jointly by ourselves and L'Air Liquide. That was something on the order of 80 percent of the market.

Q I believe you referred to that as a tiny acquisition. What percentage of the market when you made this acquisition in Hong Kong, what percentage of the market did they have at that time?

A Quite a large one. I would guess more than 50 percent.

Q And what percentage does BOC have today in Hong Kong?

MR. TOPKIS: It is not BOC.

A It is a joint company owned between ourselves and L'Air Liquide and that company has something on the order of 80 percent.

Q Now, the British Oxygen Hong Kong Limited is jointly owned?

A Not British Oxygen Hong Kong Limited. The Hong Kong Oxygen Acetelyne Company which is the holding company which holds our 50 percent of the interest.

Q Now, I believe you testified that you had many -- you operated in many countries at the time of your employment with BOC. How does that compare with today?

A We operate in a good many more countries today and, of course, the map of the world has changed since those days a bit, too.

We have seemed to produce more countries than there were in 1956.

Yes, we have added to it.

Q What countries have you entered since 1956 and what was the method of entry?

A We entered the Italian market where we bought 50 percent in an existing company. We entered Indonesian market which was a D'Novo entry. We entered the Thailland market where we bought part of an existing operator. We entered the Bangladash market by, in fact, buying back part of the existing business which was owned by a Pakistan company before the Indo-Pakistani war and we entered the Brazilian market with a Brazilian partner but, primarily, on a D'Novo basis.

Q The Indian market that you entered D'Novo, what size plant did you build there?

A India?

Q Indonesia.

A Very tiny, a little gas pump.

Q What percentage of the market in Indonesia do you have today?

A It is in fact run by our Australian subsidiary. I

would guess less than fifteen percent.

Q Now, you entered the Brazilian market with a local partner?

A Yes.

Q And this is a fast growing market, Brazil?

A Yes.

Q What was the size of the plant that you started with in Brazil?

A There, and it is still being brought on stream, it is not in operation yet, it is that recent, we are starting with a tonnage plant.

Q What size?

A From memory, it is 240 tons per day.

Q So, you don't have a share of the market yet?

A That's right.

Q Do you have a merchant business there?

A Just started last month.

Q So, you haven't accomplished any market share yet?

A No, we haven't.

Q Now, in 1956 when you started your employemnt with BOC, was the UK industrial gas market at that time a highly developed market?

A Not highly developed as we recognize it today.

Q When did it become a highly developed market?

A When the full impact of the tonnage oxygen plant

was made which would not have occurred until the mid 1960's.

Q Now, in 1956, what percentage of the UK market did BOC hold?

A Ninety-eight.

Q What percentage of that market do you hold today?

A My answer has got to be a generalization because it varies with each product, each part of the industrial gas business. But, by generalization, I would say around seventy-five.

Q Who took up this other share?

A Air Products.

Q When did Air Products enter this UK market?

A It started as tonnage in 1954 and in 1955 they entered into partnership with a British company called Butterley Company.

Q I take it that company had less than two percent of the market?

A No, that wasn't the company that had the other two percent. The other two percent was held by a company called Saturn.

Q Did Butterley have any percentage of the market?

A None at all.

Q Air Products was a D'Novo entry?

A That's right.

Q What size company -- when did they enter, Air Products?

A 1955, 1956.

Q What size company was Air Products at that time?

A I have no idea. I beg your pardon. I mustn't say I have no idea.

A comparatively small company in today's terms.

(continued on next page)

Q Do you know what size plant they started with?

A Yes.

The first plant they put down in the UK was something in the order of thirty tons per day, in Southampton, to serve Esso.

Q What share of -- I believe you said BOC has about 75 per cent of the market today, what share does Air Products have of the UK industrial gas market today?

A 25.

Q Turning to your sale of plants, the air separation plants, has BOC ever sold any of these industrial gas plants to steel companies in the United States?

A BOC itself, no.

Q Has BOC ever sold any plant, air separation plant to chemical companies in the United States?

A No.

Q To glass manufacturers?

A No.

Q To any other industries?

A Yes.

We have sold them to industrial gas companies in the states.

Q To whom?

Who were these companies to whom you sold?

A Big Three and in fact, for Airco, at the tail end of the joint venture.

Q What was your position in boc in 1969?

A In 1969 I was the group managing director.

Q And in 1970?

A I remained the group managing director until March 1972 when I became chairman.

Q And was John Williams under your supervision in 1969?

A Yes.

Q In 1970?

A Yes.

Q What was his position?

A He was a managing director of BOC.

Q He reported to you then?

A Yes.

Q What was Mr. Hutchison's position in 1969 with BOC?

A He was the chairman of BOC.

Q Did Mr. Hutchison and you meet with Mr. Robert S. Johnson of Loeb-Rhodes in November of 1969.

A I am not sure about Mr. Hutchison, but I did.

Q And did you discuss the possible acquisition of Chemitron by BOC at that time?

A Yes.

Q Were you aware that subsequently in January of 1970 Mr. Williams of BOC flew to Chicago and met with representatives of Chemitron?

A Yes.

Q Was that for the purpose of talking acquisition?

A Talking possible acquisition, yes.

Q Did Mr. Williams report to you on dqscussions that he had with Chemitron representatives?

A Yes, he did.

Q Were you still managing director in July of 1971?

A Yes.

Q What was Mr. Williams' position at that time?

A He was still managing director. Theposition had not changed.

Q What was the position of Temple Roberts at that time?

A He was a member of the market research team at Hammersmith which, at that time, was attached to the planning secretariat which we had then.

Q Were you aware that in 1971 Mr. Williams met in London with Burdett Oxygen?

A I am aware now. I wasn't aware at the time.

Q When did you become aware of that meeting?

A A month or two afterwards.

Q Wereyou aware that subsequently in September 1971 Temple Roberts met in Norristown, Pennsylvania with Mr. Perkins?

A Yes.

Q Do you know how long he spent there at theplant?

A I don't know.

Q Does four days sound reasonable to you?

A Yes, I wouldn't be surprised.

Q Was the purpose of this thepossible acquisition of Burdett Oxygen Company?

A I believe so.

Q Did you know before he went over there that he was going over there for that purpose?

A No, I didn't.

Q I showyou Commission Exhibit 254A through S, a report of a visit.

Have you seen this report?

A I don't think I have, no.

I don't recollect having seen it, no.

Q I show you Exhibit 250A through C.

Are you familiar with that document?

A Well, since I see I had a copy, I must have read it at the time.

It had such little significance, it didn't register.

Q Mr. Smith, I show you CX225A and B.

Didyou write that?

A Yes.

MR. THURMAN: Now, I would like to point out

to your Honor Mr. Smith has testified that he never considered acquiring Chemitron.

MR. TOPKIS: What is this?

Q Mr. Smith, do you remember testifying at an FTC investigational hearing respecting this case on December 19, 1973?

A Yes, I do.

Q Do you remember being asked at these hearings whether BOC ever considered acquiring Chemitron?

MR. TOPKIS: Your Honor, I think the proper way to ask that question is to call the witness' attention to a question and answer.

MR. THURMAN: That is not the proper way to do it and I don't like the suggestions from counsel.

JUDGE BARNES: Repeat the question.

Mr. Reporter, read it back and we'll see if it is proper.

(Questionread.)

JUDGE BARNES: That is a proper question.

A I have some difficulty here.

THE WITNESS: May I have a word of explanation, please?

JUDGE BARNES: Yes.

THE WITNESS: The question was asked, did you consider.

Now, if I wake up one morning and I say to myself, what a good idea to acquire Chemitron, that is consideration.

If I spent two years in the study of Chemitron in order to acquire it, that is also consideration.

My answer, my testimony at that earlier hearing was concerned with did we seriously consider Chemitron and no, we didn't.

But if you say, did we consider acquiring Chemitron, then the discussions I had with Johnson, yes, that is a form of consideration.

But, as far as serious considerations go, the study of the company, the study of the market and the study of the company's financial record, none of that was ever done and none of it ever reached the BOC board where authority rests.

Did we consider? Yes, we did.

Did we seriously consider? No, we certainly didn't.

I hope that explains it.

MR. TOPKIS: And your Honor, lest you be under the impression from my friend's observation that there is any inconsistency in what the witness says, I think the transcript makes clear that he does not --

JUDGE BARNES: I don';t think he indicated any

inconsistency to me, which he would have to do by reading the question.

BY MR. THURMAN:

Q In the question submitted to you at the investigation hearing at page 224 -- 242, the question was:

"I take it then you would never say that you considerdd acquiring Chemitron?"

Your answer is:

"That's correct."

A That is right, if by that was meant serious consideration.

Q Serious is not in there.

A No, it is not, but to consider is just a thought off the top of your head also.

It may be that we are having trouble with the language.

Q Did you make any attempt to explain that at the time?

A I took the word "consider" to mean "consider" in the English context.

It may have different meaning in the American context.

MR. TOPKIS: May I call your Honor's attention to something eleven pages later in the record where the witness did explain?

JUDGE BARNES: I will let you do that on redirect.

8

MR. TOPKIS: Fine.

Q I show you -- in connection with Exhibit 225A, and I quote, this is from you to Mr. Perkins -- I mean, Mr. Perham of Canox -- "It will be obvious to you as it was to us that an outlay of 140 to 150 million for a hundred per cent purchase can hardly be contemplated.

"Part purchase now aimed at eventual control couldbe interesting. We said so and expressed a willingness to continue talking. Accordingly, Johnson Williams called on Chemitron on 8 January during his recent visit to the USA.

"John left them with a prepared quesionnaire listing the major items of information we would acquire wiht the matter if it were to proceed forward.

"The probability of having completed the questionnaire, Gallagher will bring it to London for further discussion."

A Indeed I said that and the questionnaire was never completed.

Q I believe you testified that you didn't prepare or do any market studies.

Temple Roberts spent four days in Norristown, didn'e he --

MR. TOPKIS: Could you read the question back, please?

JUDGEBARNES: Are you directing your question to Burdett?

MR. THURMAN: Yes.

THE WITNESS: May Ihave the question again, please?

Q I believe you testified that you didn't consider anybody else and made no studies of the market.

Then Temple Roberts spent four days studying the business of Burdett of Norristown --

MR. TOPKIS: I still don't understand the question.

JUDGE BARNES: I don't either.

Q Do you consider a -- do you consider this a study or looking into a company in the industrial gases market?

A I'm sorry, I have no idea what hespent the four days on.

I didn't even know he had gone.

Q He was sent by Mt. Williams under your direction and you wouldn't have any knowledge of anybody making an expenditure to Norristown from London to make a possible acquisition?

A If John wanted to do that on his own, he could.

Q He was acting on behalf of BOC?

A Of course.

Q Such a thing as this would not come to your attention as chairman of the board?

A That wouldn't no.

It was much too insignificant.

I was told what happened subsequently.

Q I believe you were asked in an investigational hearing on page 241 in regard to attempting to pick up stock in Airco whether you had approached anyone else and the answer was no.

And you were asked would there be anyone else in the company who approached any other firms in the United States without your knowledge.

And your answer was I don't think that would have happened. It certainly wouldn't happen to my knowledge.

A Remember testifying that BOC didn't approach any American industrial gas company with a view toward acquisition.

I remember testifying to that.

Nor, to my knowledge, had anybody else in BOC done that.

Q But now you are saying that somebody went to Norristown --

A On the contrary,that approach was made to us.

We did not make the approach to Perkins.

Q It was an approach made by Chemetron to you?

A Yes.

Q Who made the approach to you on behalf of Chemetron?

A Mr. Johnson.

Q So you are saying an independent broker as agent for Chemetron?

A He said he was the agent for Chemetron.

Q You didn't testify to any contacts as to who was approached in the investigational hearing; is that correct?

MR. TOPKIS: I don't understand the question.

JUDGE BARNES: I don't, either.

MR. THURMAN: Why weren't we told at the investigational hearing?

MR. TOPKIS: Maybe the question wasn't asked.

JUDGE BARNES: Do you have a question, Mr. Thurman that you would like the witness to answer?

Q Were you aware that Mr. Perham and Dr. Albert Muller met with representatives of Gardner-Cryogenics in 1970 and discussed a possible acquisition of Gardner-Cryogenics?

A Put in that way, my answer has to be no.

That they visited Gardner-Cryogenics with the purpose of discussing the possible acquisition of the european operation of Gardner-Cryogenics, yes.

Q Did thediscussions lead into the possible acquisition of the USA operations?

A Not to my knowledge.

Q Is it true that Mr. Perham had responsibilities of

seeking acquisitions in the United States?

A No.

Q What were Mr. Perham's duties in making studies of the market?

MR. TOPKIS: In making what studies of what market?

Q He had no duties as far as trying to acquire companies in the United States; is that your testimony, sir?

A That is exactly my testimony.

Q Will you explain what his duties are as Canox chairman?

A His duties were to chair the board of Canadian Oxygen and through the-- to direct the development and direction of Canadian Oxygen.

His duties also included being a member of the board of Harris Calorific.

He was also a member of our BOC International forum which I tried to explain yesterday.

And then from time to time he was given additional duties such as the commissioning of the study of American industrial gas markets, known as the Perham-Greenfield report, which he produced and it is also right to say that we required of him to act as a listening post to advise us of developments which were taking place

in the indastrial gas industry in America.

Q If I understand you correctly now, your testimony is that Mr. Perham was not to look for any acquisitions in the United States?

A That is right.

Q I show you Commission Exhibit 36A and B.

Are you familiar with thatdocument?

A Yes, I wrote it.

Q I read to you what you wrote:

"As part of its declared policy to become more truly international, BOC seeks profitable opportunity to extend its operations in the world'smost importand and advanced market -- North America.

"In order to enable more attention, to be devoted to the coordinated research for opportunity, it has been decided that Mr. J. A. Perham, president, Canox, will assume responsibility for all such activity.

"So Mr. Perham can devote the necessary time to ths, Mr. A. R. Dow has been appointed executive vice president, Canox, thus relieving Mr. Perham of day to day management responsibility for the Canox operation.

"Mr. Perham will be assisted in his new operation of Dr. A. Muller. North American in this context means USA, inluding Puerto Rico, Canada and Mexico."

14

I show you another document, CA 25A through C, and ask you if you recognize that document.

A Yes, it is another one I wrote.

Q I read there:

"If we now turn to the contribution of your making--"

This is to Dr. Moeller.

"Isuggest this best be summarized as proposals for business opportunities and development in the USA."

MR. TOPKIS: That is A. Why not read B as well.

If I may, your Honor, B is advice and assistance in the promising lines of research and evelopment.

MR. THURMAN: Mr. Topkis has an opportunity for redirect.

MR. THURMAN: I Read what I want to.

JUDGE BARNES Well, let's be fair to the witness.

MR. THURMAN: If he has an objection, let him object properly.

We are showing that they were seeking opportunities in the USA.

He states that they were not and here he says that Mr. Perham was assigned the duties --

THE WITNESS: I'm sorry, I really must interrupt.

The questionyou put to me was not looking for opportunity but looking for acquisitions.

Q What is an opportunity in the United States?

A It could be a hundred and one things.

Q It could be a de novo entry or it could be an acquisition; isn't that correct?

A Those are two out of a hundred possibilities.

JUDGE BARNES: You won't be looking in the field of manufacturing automobile tires, would you?

THE WITNESS: No, God forbid.

But, opportunity, of course, the thing uppermost in our minds at the time was new technological developments, interests in the business in which we were interested.

Welding, medical, gases, and so on.

Q What is the major portion of your business?

A The major portion is industrial gases.

MR. THURMAN: Your Honor, at this time may we have a five-minute break?

JUDGE BARNES: All right.

We will take a ten-minute recess.

MR. TOPKIS: Could we be advised, your Honor, how long cross-examination is expected to be?

MR. THURMAN: The rest of the day, I think.

MR. TOPKIS: Your Honor, the witness has a ticket for another ten o'clock plane for London tonight.

JUDGE BARNES: Mr. Smith, in terms of total sales, I guess industrial gas is your largest product?

THE WITNESS: Yes.

JUDGE BARNES: What would be the next?

THE WITNESS: After gases, the next largest part of the business as far as the gorup is concerned is welding equipment and material.

JUDGE BARNES: Would there be a number three category?

THE WITNESS: No.

Number three would probably be chemicals which is restricted to the UK.

BY MR. THURMAN:

Q Mr. Smith, I believe you testified that BOC was never interested in anybody except Airco.

You made no contacts with any other industrial gases company in the United States, is that correct?

A I don't recollect testifying that our only interest in industrial gas companies was Airco.

Q What interest did you have -- what other companies did you have in mind that you were interested in?

A We had a general interest in the industrial gas market

in the United States.

Q So you possibly would have acquired somebody else other than Airco; is that correct?

A Well, possibly, yes.

Q In 1970 you were interested in acquiring a portion of Burdett of Norristown?

MR. TOPKIS: 1970?

Q I mean Burdett of Cleveland.

A Were we interested?

MR. TOPKIS: A portion.

Q A plant or some part of the business of Burdett of Cleveland?

A I think in 1970, and I suspect it would be equally true today, our Canadian Company would have been interested in acquiring the Niagara plant of Burdett of Cleveland.

Q This Niagara plant is in the United States?

A Yes.

Q BOC let this be known to Burdett, Is that correct?

A I think Canadian Oxygen let it be known to them.

Q Isn't Canadian Oxygen a subsidiary of BOC?

A Yes.

Q And Mr. Perham had the duties assigneed by you as looking at interested in the United States?

A Yes.

But that was through his position as head of

Canox.

Q Didn't you let them know that BOC or Canox was interested, to let Burdett of Cleveland or its bankers know that --

A I was happy to go alongwith the chairman of Canadian Oxygen's view that for the development of Canadian Oxygen he would be interested in acquiring the Niagara plant of --

A Yes.

Q Peter Reid who was with Harris Calorific, you let him contact the banker and let him know of your itnerest, is that correct?

A I didn't do that.

As far as my recollection is concerned, I didn't do that.

Q Didn't you tell Perham to do it through Mr. Reid?

A No, not to my recollection.

Q I show you Commission Exhibit 244A.

Are you familiar with that?

A Yes.

I think you are misreading the note.

May I just quote the note?

It says "Les telephoned JAP."

Now, Les is me, L. E. Smith.

JAP is J. A. Perham.

It goes on that he had contacted Peter Reid.

He had contacted Peter Reid, solicitor to Harris Calorific, who has close contacts with the bankers who now effectively own Burdett.

Now, I think it is being misread that he who contacted Peter Reid was Mr. Perham, not Mr. Smith.

I personally did not contact Peter Reid to talk about the possibility of buying the Niagara plant.

Q You talked to Mr. Perham?

A Yes, I did.

Q That BOC or Canox -- Mr. Perham had the responsibility of looking for opportunities in the USA and that you were interested in buying the Niagara Falls plant.

A Excuse me.

The Niagara plant had little to do with BOC's interesed in the American industrial gases market.

Its prime interest was in the development of the Canadian Oxygen Compan y of which Mr. Perham was president and later chairman.

Q Mr. Perham was looking into the USA assigned from you, isn't that correct?

A He was looking for opportunities that have broad field which included the opportunities in technology, licensing, all sorts of things.

Q And plants.

He was looking at the Niagara plant of an industrial gas company; isn't that correct?

A That he was doing for his own company, Canadian Oxygen.

Q Who owns Canox?

MR. TOPKIS: Your Honor, isn't it badgering the witness?

A BOC.

Q Mr. Smith, do you remember testifying yesterday that a representative of Airco met in the summer of '73 with Mr. Laister of BOC and that the two of them discussed the possibility of a closer association of Airco and BOC?

A Yes.

Q And you also testified, I believe, you -- that a short time later Mr. Giordano met with you and that Mr. Giordano suggested that BOC acquire Airco?

A No, I did not testify that way.

Q Then straighten me out, will you please, as to when you started considering the purchase of Airco and how this came about.

This was my understanding of your testimony yesterday, that this came out through this meeting, this social meeting with Mr. Laister and then Mr. Giordano met with you about a week later and discussed with you the acquisition of acquiring-- the interests of

acquiring Airco --

A I certainly didn't testify yesterday thatmy first meeting with Mr. Giordano in the summer of 1973 that I said BOC would like to acquire Airco.

That isn't the gist of that conversation at all.

What in fact Mr. Giordano and I talked about was the possibility of some form of closer association between the two companies.

That's what I testified to yesterday.

We didn't know what form thatcloser association should take and that is why we set up the working part.

First to see if a closer assocaation made sanse from both companies' point of view and, secondly, if it did, what sort of association we should aim for.

Q My question was gettingback to, was this the first contact or consideration by BOC in getting a closer association or an acquisition of Airco?

A You are giving me a problem when you say "consideration," because consideration can mean so many things.

If consideration means did the chairman of British Oxygen, ten years ago, think it would be a good idea to have an interest in Airco, then I don't doubt that he had those thoughts.

But, if you mean by consideration did BOC

sit down and do a serious study onwhether it should acquire a portion of the whole of Airco and what would result, then thd answer is no.

Q We are not trying to go back ten years. We are going back to your meeting with Mr. Giordano.

Was this the first time you or BOC had considerdd, seriously, acquiring stock --

A Yes.

Q Well, the question -- the rest of the questio is -- in Airco.

And the answer is yes.

Mr. Smith, I show you CX73A through 73J.

Are you familiar with that?

A Yes.

Q So, this is a consideration of Airco; is that correct?

A Yes, at the time of the discussions I had with Mr. Giordano.

Q I show you CX-76A through 76.

Are you familiar with that document?

A Yes.

Q And that is another study --

A Done on the 29th of June '73, the time of my discussions with Mr. Giordano.

Q Did these discussions proceed -- these studies, did

they precede the first contact with Mr. Giordano?

A No.

Certainly they didn't precede the talkwith Mr. Laister, that Mr. Laister had with Mr. Craig, which was followed a few days later by my talks with Mr. Giordano.

These studies were borne out of those two discussions.

Q Now, I show you Exhibit 78A through 78D.

Are you familiar with that document?

A Yes, I wrote it.

Q That was the meeting with Mr. Giordano?

A Yes.

Q I quote --

MR. TOPKIS: It is an in camera document. What part of it doyou want to quote?

(Document shown to Mr. Topkis.)

MR. TOPKIS: I have no objection to that.

Q I would like to quote:

"At no time during our discussion, right up until the timeI left, could I be suere whether there was a genuine offer or whether he --" I assume referring to Mr. Giordano -- "had, thorugh a possibly variety of sources, got wind of the eminence of a BOC bid and was using the merger offer as a means of discovering

our intentions."

Is that accurate?

A Can I refresh my memory from that?

Q Yes.

A Yes.

Q At this first meeting it was imminent that you were going to put a bid --

A Were we going to put a bid in, no, that was not the case.

Q Well, we'll let it speak for itself.

MR. THURMAN: This would be a good timeto break for lunch.

MR. TOPKIS: Oh,your Honor.

MR. THURMAN: Why do you say "your Honor." Isn't noon a normal time to eat?

MR. TOPKSI: We have had two or three recesses during this cross-examination.

Can't we move?

JUDGE BARNES: We can quit now or at 12:30 and we can come back at 12:30 or 2:00.

Does it matter?

MR. TOPKIS: It doesn't matter to me.

JUDGE BARNES: Would you prefer to quit now and come back at 1:30 or quit at 12:30 and come back at 2:00?

MR. THURMAN: I would rather quit now and come back at 1:30.

JUDGE BARNES: Off the record.

(Discussion off the record.)

JUDGE BARNES: On the record.

We will adjourn until 1:30.

(Whereupon, at 12:00 noon the hearing adjourned for lunch.)

?

(The parties returned at 1:30 p.m. and the hearing commenced as follows:)

Q Mr. Smith, it is my understanding from your testimony that BOC desired to enter the United States industrial gas market for many years, and continued this desire until it entered through the AIRCO acquisition; is that correct?

A No, I would like to correct that understanding.

Q The answer is yes or no.

A No.

Q You were asked a question during the investigational hearings in Washington, and I quote --

MR. TOPKIS: In New York.

Q Excuse me, in New York, the bottom of page 235 and page 236, the top of 236, "Correct me if I am wrong, as I understand your testimony, it is that BOC desired or still desires to get into the United States industrial gas market and has for a number of years."

Your answer was "Yes."

Do you recall that?

A Yes, I do indeed recall it.

Q Mr. Smith, you testified it would take 100-million pounds sterling and 10 years to enter the United States industrial gas market either de novo or through a small acquisition. What share of the national market were you referring to that required that much time and money?

A I did not testify to that extent. I testified that as a guess my guess would be it would cost a hundred million pounds sterling and take 10 years.

I said that in my view, again as a guess, it would take that long to produce a viable operation, and by viable operation I attempted to describe that as one that gave a reasonable return.

I was then asked about the question of what share of the market, and I said that 5 percent of the national market would not so produce a viable operation, whereas quite clearly 40 percent probably would.

Q 40 percent would?

A Yes, indeed. So somewhere in between there.

Q It is a wide variance?

A Yes, it is.

Q Do you have an idea where it is in that variance?

A It would be a pure guess.

Q What would be your guess?

MR. TOPKIS: Does that make a difference?

JUDGE BARNES: I think it is clear enough.

MR. THURMAN: I withdraw the last question.

Q That de novo entry thenwas possible at the time BOC acquired the stock interest in AIRCO; is that correct?

A I find it very difficult to give a yes or no answer to that. I cannot conceive the circumstances in which I

would have persuaded my board to expend that amount of money and take that amount of time, and to have that deteriorating effect on our return that they would have said yes.

It is possible, yes, in a lunatic asylum, it is possible.

Q How about acquiring a small company and expanding it?

A I think yesterday I gave my reasons for not acquiring a small company. But having done so, if we had acquired a small company, then to mount the operation and expand it into being a viable national company, which, if we had any interest, that is what we would be interested in, it would still have cost us an awful amount of money and taken a long time.

The key to the market lies in the tonnage plant, not in the small little plants that you find scattered around the country, any country.

Q What amount of money are you talking about now in expanding a smaller company, Big 3 or smaller, which I believe you considered Big 3 or some in the middle or lower class areas; what amount of money are we talking about expending to expand them into a national market?

MR. TOPKIS: Before the witness answers, are we talking about Big 3, Big 3 after all is a publicly traded company listed on the New York Stock Exchange, its stock is

today selling at a certain price, I don't happen to know what it is offhand, and it has a certain number of shares outstanding. Maybe you could or couldn't buy it at that price, maybe you would have to pay double as BOC did for AIRCO stock. I don't know.

It seems to me we ought to be very precise when questioning along this line.

MR. THURMAN: The question is, what are you talking about in money, taking a smaller company than AIRCO and expanding?

MR. TOPKIS: What smaller company?

JUDGE BARNES: It is a proper question, he can answer that.

Q Expanding it into a viable competitor with AIRCO.

A Assuming that such a smaller company was available, I am not going to depart from my guess of 100-million sterling and 10 years to mount a viable national operation.

Q Is it your testimony that you can enter de novo just as easy or difficult, whichever way you want to state it, but take the same to enter de novo as it would acquiring a company with 25, 50, 30-million dollars worth of sales already producing worth plants and contracts?

A That is what it would cost Big 3 if they did decide to expand beyond their existing regional area, if they wanted to expand on a nationwide basis.

Q I don't believe you have been responsive to my question, Mr. Smith. Myquestion is, is it your testimony that the cost and time element would be identical by entering de novo, BOC entering de novo, as it would acquiring a company on a smaller scale than AIRCO already established in the United States market?

A Assuming the same objective, I don't imagine it would take very much -- it would be very different in terms of money and time.

JUDGE BARNES: It would not be very different?

THE WITNESS: No, assuming the same objective.

Q Are we talking about objective of 40 percent of the market; is that it?

A I tried to say it was a viable share of the market that would give us a return on the money, and somewhere between 5 and 40 percent.

I can't be more specific than that unless we talk about the products and where and so on.

Q Is your answer the same referring to Chemetron; would it take that much money to expand Chemetron?

MR. TOPKIS: From what to what?

Q From its present position when you looked at it, to what you consider a viable national company?

A Again I find difficulty in giving you a straight answer yes or no.

If Chemetron was available, if we wanted to buy Chemetron, if we used it as the base for expansion, the total cost, the total time would be not that much different.

Q Are you familiar or aware of L'Airliquide's entry into the United States industrial market?

A Yes.

Q And what method or how did L'Airliquide enter the United States industrial market?

A In general.

Q And how did they enter?

A In general terms, yes.

Q How did they enter?

A They first acquired a company called American Cryogenics, and subsequently added to that two or three smaller companies.

Q Do you know what share of the market American Cryogenics had at that time?

A No.

Q Wasn't it less than 2 percent?

A I wouldn't have thought so.

I don't know the answer to that question. My guess would be 4 or 5 percent.

Q It could be 2 percent since you don't really know?

A Yes, it could.

MR. TOPKIS: He doesn't know, it could be 90 percent.

7

Q I believe you referred to that as small. Do you know the share of dyecorygens?

A It must be very small.

Q Gulf?

A It must be very small.

Q Industrial Air Products?

A They are all very small companies.

Q Were any of these companies national companies?

A Not to my knowledge.

Q How do you reconcile the fact that L'Airliquide entered by acquisition of small companies, and in your testimony yesterday BOC could not enter the United States marked in that manner?

A First, because in any case, American Cryogenics was only offered to only L'Airliquide and to nobody else, and certainly not to BOC.

Secondly, L'Airliquide objective is different from that of BOC's.

Q I guess you better enlighten me on that, how is the objective different?

A I don't know what L'Airliquide's objective in buying up this string of companies is. I know what ours is, but I don't know what theirs is.

Q Mr. Smith, maybe I better clear it up for my own mind.

S

My question was not why did BOC not acquire American Cryogenics, my question was why didn't they use the same approach say with companies similar to American Cryogenics; is that the way you understood the question?

A No, I thought you were asking me why didn't we do the same as L'Airliquide.

Q The same type of approach?

A I really don't know about American Cryogenics and Dyecoxyngens and Industrial Air Products.

Q You looked at some of these companies, didn't you?

MR. TOPKIS: What ones do we have in mind?

MR. THURMAN: Is that an objection, I am asking him if he looked at some industrial companies.

JUDGE BARNES: It is a proper question. I think he already testified about the other companies.

You did look at other companies, didn't you?

THE WITNESS: As a desk study. We were aware of them.

Q At the time of the stock acquisition of AIRCO, what share of the United States industrial gas market did BOC estimate AIRCO had?

A From memory, we were estimating something between 20 and 25 percent.

Q How about Linde, did you have an estimation of what Linde's share of the market was?

A I can't recall it. We probably did. I don't remember.

Q Air Products?

A Again I can't recall.

Q Do you know what you estimated L'Airliquide's share was at that time?

A No.

Q Do you have any estimates of any of the other industrial gas companies' shares like Big 3?

A I don't, personally. Somebody in our organization probably has.

Q Chematron?

A No, I don't know.

Q Burdett of Cleveland, do you have any estimate of what their market share was at that time?

A I can guess. Somewhere in an organization there will be an estimate, but I don't know.

Q Mr. Smith, did BOC acquire effective control of AIRCO?

A I don't know.

Q Were you ever told that this was effective control?

A I don't think so. Not that I can recollect.

Q What was the purpose of acquiring the stock in AIRCO?

A I think as a matter of fact, I have given this in my testimony yesterday, I am very happy to go through it

again.

The first reason is that we have always been interested in the industrial gas market of America. While there is no virtue attached to the claim of being an international company, there are nevertheless benefits which can be obtained by being an international company, and quite clearly, those benefits are diminished if we don't have a position in North America.

Q Let me interrupt you, if you don't wantto go into the complete thing.

A I am quite happy to.

Q You are saying that acquiring this AIRCO stock is expanding you into --

A This is one element.

Q (Continued) -- into international competition?

A This is one element.

Q I would like to bring your attention to the investigational hearing as far as control is concerned.

MR. TOPKIS: What page?

MR. THURMAN: Page 288.

MR. TOPKIS: What line?

MR. THURMAN: Line 20.

Q "Do you envision 26 percent, should you acquire that amount, as giving you control over AIRCO?"

I believe you answered on the next page, page 289.

MR. TOPKIS: I object to the witness being asked a question and the answer immediately following it he does not read.

MR. THURMAN: I am reading what I want to read. I want the Judge to hear it.

MR. TOPKIS: I am objecting.

JUDGE BARNES: He has an objection pending.

MR. TOPKIS: May I show your Honor the transcript so you may understand it?

Here is the question, your Honor.

MR. THURMAN: Your Honor, Mr. Topkis has the right of redirect. If he wants to bring out something else, that is his business.

For him to jump up, interrupt, not object, is out of order.

JUDGE BARNES: You have read a question now. Where do you intend to read thereafter?

MR. THURMAN: The second page.

JUDGE BARNES: What part?

MR. THURMAN: It pertains to control in the United States of AIRCO. It is lines 5, 6 and 7 of page 289.

JUDGE BARNES: That is only part of the answer, I think when you are going to call the witness' attention to a previous question, you should call his attention to the entire answer.

MR. THURMAN: I don't mind reading the whole thing, I want to read what I want to read.

JUDGE BARNES: I think you should read him his entire answer.

MR. TOPKIS: Thank you, your Honor.

MR. THURMAN: I respectfully submit that this would be a poqtion for redirect if he wanted to get into that.

Now, Mr. Topkis tries to make up his rules of evidence, the best evidence rule along as we go.

I will try this part the way I think it should go.

The answer is "I envision as being sufficient to enable us to bring a substantial influence to bear on the AIRCO situation. Whether it is control or not, again I think the situation here in the States is different from say, for instance, the UK, or the Australian situation, where to have control requires 51 percent. Here I am advised that effective control as distinct from statutory control can be obtained with a lower percentage."

JUDGE BARNES: Now what is your question?

MR. THURMAN: He said he had no idea what is control or not. I wanted to bring to your Honor's attention that he made a previous statement that it was effective control.

JUDGE BARNES: I don't believe that answer says that.

MR. THERMAN: That is the way I interpret it. I am bringing it to your Honor's attention.

JUDGE BARNES: All right.

Q In your opinion, Mr. Smith, is the Canadian market a mature industrial gas market?

A Yes.

Q I believe you testified that Canox was one of the four BOC overseas companies; is that correct?

A Yes.

Q I believe you also stated Canox had 8 to 9 percent of the Canadian industrial market, and is No. 3 in that market; is that correct?

A Yes.

Q What size industrial gas plants does Canox have?

A Very small.

Q Do you know what size gas plants Burdett of Cleveland operates in the United States?

A Yes, they in fact operate two tonnage plants.

Q Do you know the size of those tonnage plants?

A Not offhand. I would be guessing.

Q It would be larger than the plants operated by Canox?

A Certainly.

Q Do you know what size gas plant Chemetron operates in the United States?

A No.

Q Do you know if it would be larger than the plant --

A I guess it would be larger than the Canadian plant, yes.

Q Do you know what size plants L'Airliquide operates in the United States?

A No, I don't.

Q Would you know --

A I would expect they are larger than those of Canadian.

Q Do you know what size plant Alabama Oxygen operates in the United States?

A I am afraid not.

Q Do you know if it would be larger than Canox?

A No.

Q Do you know what size plant Selox operates in the United States?

A I have never heard of the company, so I certainly don't know what plant they operate.

Q Do you know what size plant Burdett of Morristown operates?

A No.

MR. TOPKIS: It is clear that there isn't a company in the United States that hasn't a larger plant than Canox.

15

JUDGE BARNES: I don't know if that is clear, I will let Mr. Thurman continue.

Q Do you know if the Norristown plant is larger?

A No, I don't.

Q The plant that you were looking into at Niagara Falls, was it larger?

A Yes.

Q Operated by Canox in Canada?

BEST COPY AVAILABLE

A The plant at Niagara Falls?

Q Yes.

A Certainly that is larger than anything operated by Canox.

Q Do you know what the plant in Niagara Falls would have cost BOC if it had been successful in obtaining that plant?

A No, I don't.

Q Would it be around 4, 6-million dollars?

A I honestly don't know. I don't even know the precise size of the plant.

Q Mr. Smith, I believe you testified that BOC and AIRCO representatives met in New York in July, 1973, to discuss a closer association between the two companies. When was this close association discussed? What was discussed at that meeting?

A That was the purpose of the meeting, to discuss what

type of association might be brought about.

Q Did you discuss a merger at that time?

A I wasn't at that meeting, but certainly the reports that I was given subsequently did not talk about merger.

Q Do you know if any confidential information between AIRCO and BOC was exchanged at that meeting?

A I think so far as BOC was concerned, it did give the AIRCO representatives a copy of a five-year group forecast that was current at that time.

I am not aware, in fact, of any information of a confidential nature coming from AIRCO to BOC. There may well have been, but I am personally not knowledgeable of it.

Q I show you, Mr. Smith, Commission Exhibit 301-A through Q for identification. I ask you, do you recognize that document?

A Yes.

Q Was this the document exchanged or given?

A We passed over to AIRCO.

MR. THURMAN: Your Honor, complaint counsel offers at this time Commission Exhibit 301-A through Q for identification to be received in evidence as CX 301-A through Q.

This was the five-year plan we offered, and was asked to excise what we felt was not relevant and give them a chance to look this over.

JUDGE BARNES: Any objection?

MR. TOPKIS: Yes. There is still material in this document which is of the highest order of sensitivity, and there is a great deal of information in this document which has no bearing, in our judgment, on the issued before this court.

If your honor would like to hear a discussion of that subject -- I don't know everyone who is here -- yes, I see some representatives of at least one of our competitors -- I would like to discuss it in camera.

I suggest that we can perhaps put it off to another time unless Mr. Thurman wants to interrogate the witness about it.

MR. THURMAN: I want to ask him some questions concerning it.

JUDGE BARNES: It has been identified, you can question the witness.

MR. THURMAN: I didn't realize you could question unless it was in evidence.

JUDGE BARNES: You identify an exhibit, you can ask the witness all kinds of questions about it. You don't have to quote any figures, you can call his attention to certain figures and ask him about them.

MR. THURMAN: I don't believe we have to, I don't think we have to quote figures.

JUDGE BARNES: All right.

C Mr. Smith, I show you CX301 C for identification, and I ask you what products are produced and sold by advanced engineering?

MR. TOPKIS: Forgive my rising, but I think the question is a little ambiguous. I think that what my friend is driving at is what products are included in those figures there next to advanced engineering.

JUDGE BARNES: This is not the name of a company, this is a category of sales?

MR. THURMAN: Yes.

JUDGE BARNES: All right.

A Yes, there are two main categories of product included in advanced engineering, the first is the high vacuum products, and our company Edwards High Vacuum International is part of that division.

The other category of product is in medical equipment.

JUDGE BARNES: What are high vacuum products?

THE WITNESS: These are bits of pumps and various kinds of equipment, processes and so on, designed to bring about a state of vacuum.

JUDGE BARNES: Is it air, water or both?

THE WITNESS: It is both, yes.

In our case high vacuum. There are various

segregations, degrees of vacuum. This is the high vacuum field.

Q I believe you stated medical equipment. I refer you to CX301 N for identification, and ask you what does medical equipment lung function include, what products?

A I'm sorry, I don't have a detailed knowledge of the medical equipment products, and I don't think I can give you a proper answer.

Q I believe you testified something about medical products this morning, maybe I will make my question more general.

Do you know the categories of medical equipment that would be included?

A Apart from it being medical anesthesia, and oxygen therapy, that is about the limit of my detailed knowledge.

Q Do you know what medical equipment is marketed or manufactured by Canox?

A Not in any detail.

Q Would it be in the broad categories you just mentioned; would that be the same categories by Canox?

A It would certainly include those categories.

Q Do you know what share of the market Canox has in those products in Canada?

A No, I don't.

JUDGE BARNES: You will have Mr. Perham as a witness

later.

Q Mr. Smith, do you know what percentage of the anesthesia equipment market in the UK is held by, or counted for by BOC?

MR. TOPKIS: If your honor please, I haven't objected before as to the use of the term market, and I don't propose to now. I take it I have a kind of a continuing objection to any legal significance to be attributable to any such testimony.

JUDGE BARNES: His market does not necessarily mean market for anti-trust purposes in this case.

MR. TOPKIS: Fine, your honor. Thank you.

A No, I don't, but I know it is high.

Q The same question now as to therapy equipment in the UK?

MR. TOPKIS: Oxygen therapy is this, or what?

Q Is this what you refer to?

A I refer to oxygen therapy.

Again I don't know, but I am sure it is fairly high.

JUDGE BARNES: Very high would be over 50 percent?

THE WITNESS: Yes.

Q I believe you testified this morning, Mr. Smith, that BOC intended to expand its participation in the medical markets in the United States; is that correct?

A Yes.

Q And does this include the operations of Fraser Sweatman and Harris-Lake?

A Yes.

Q How did BOC contemplate expanding the operations of Fraser Sweatman and Harris-Lake?

A I have no idea.

Q Do you know what Fraser Sweatman's position was with the BOC group in 1972?

MR. TOPKIS: I don't understand what that means, one of love and affection and trust, but other than that --

MR. THURMAN: Come on.

JUDGE BARNES: Let us have the question read back.

(Question read.)

JUDGE BARNES: That is a little puzzling to me. What do you mean their position was?

Q What was your position in 1972, Mr. Smith?

A I was the chairman.

Q It is clearly understood what position means.

What was Mr. Sweatman's position?

MR. TOPKIS: I am sorry.

JUDGE BARNES: I thought you meant the company. The gentleman is different.

MR. THURMAN: I am sorry to confuse the record.

A Mr. Fraser Sweatman was the managing director of Fraser Sweatman, which was the subsidiary of a subsidiary

British Oxygen.

Q Did Mr. Fraser Sweatman propose that BOC acquire Oxequip Health Industries in 1977?

A I don't know. What I do know is that never came to the BOC board.

Q I believe you read the record in this case, the transcripts, it was discussed in this case that it was brought before the board.

MR. TOPKIS: That sounds like an observation other than a question, and as such I object to it.

It is also not an accurate statement as to what the transcript contains.

JUDGE BARNES: Do you have a question, Mr. Thurman? Do you want to withdraw the previous question?

MR. THURMAN: Yes.

Q Do you recall in the record testimony that the acquisition of Oxequip was discussed informally before the board, not on the agenda, but discussed informally before the board?

A The BOC board, no, I do not.

JUDGE BARNES: I don't believe we had any witnesses who would be able to testify to that.

MR. THURMAN: He was told by Mr. Fraser Sweatman that this was discussed informally before the BOC board.

MR. TOPKIS: I have it now, your honor.

Mr. McWhinnie testified at page 1553 of the record that Mr. Fraser Sweatman, or somebody, told him that the subject of Oxequip was not placed on the agenda for the board meeting in London, but that there were informal discussions regarding it in connection with day of the board meeting, and of code, whatever that means.

Q Your recollection is -- if I understand you correctly, you are saying that you don't recall it being discussed either formally or informally?

A That is right.

Q Mr. Smith, what is Medishield, Inc.?

A Medishield, Inc. is the company registered in America as a subsidiary of Medishield London. It is designed eventually, not yet completed, designed eventually to hold the interest of Fraser Sweatman Canada, Fraser Sweatman America, Harris-Lake, and the medical equipment business of Canadian Oxygen.

Q How did Medishield Inc. come about; what was the purpose?

A The board of Medishield Corporation in London decided that it would be a convenient way of bringing together the existing Medishield interest north and south of the border.

Q Aren't these companies under Medishield Inc. involved in prosthetics?

A I don't know the answer to that.

Q Did the Airco board of directors approve BOC's tender offer for Airco's shares?

MR. TOPKIS: Could I have that question read back, please?

(Question read.)

A Yes.

JUDGE BARNES: Their approval was not required, was it, Mr. Smith?

You can make a tender offer without getting Airco's approval?

THE WITNESS: I imagine that is so.

Q Didn't you have to get their approval pursuant to the agreement that you had?

A I can't give you a straight yes or no on that. What we had attempted in London was that we would not engage in a contested bid and that we would only go ahead with the tender if it indeed had the support of the Airco board. That is what we did.

Q Airco's board in fact mailed BOC's tender offer to Airco's shareholders, did they not?

MR. TOPKIS: Airco's board surely didn't.

JUDGE BARNES: Let us say the corporation.

MR. TOPKIS: I think the question should properly be put to someone from Airco.

JUDGE BARNES: He can ask Mr. Smith if he knows.

MR. TOPKIS: All right.

JUDGE BARNES: Did Airco mail it?

THE WITNESS: I really should know, but I don't.

Q Did Airco's board oppose the tender offer of Curtiss Wright for Airco's shares?

A Well, yes they did oppose it, but what form the opposition took I don't know, I am not competent to tell you.

Q Mr. Smith, I believe you testified this morning that G. D. Searle had entered the medical equipment market, and where did they enter it, do you know?

A My knowledge is that they are already in the medical market in America, and they are expanding their interest in the medical market in Europe.

Q When we are talking about medical market now, are we talking about the anesthesia market?

A Medical market.

Q Are they in the anesthesia equipment area?

A I don't know, but I don't think so.

Q Are they in the therapy equipment area?

A I don't know.

Q I believe you stated they bought three companies, one I recall is Gold Cross Supplies. Where is Gold Cross located?

A Its head office is in London.

Q And then Cyprane?

A Yes.

Q Did they get Cyprane?

A No, we got Cyprane.

Q I believe you testified that Pfeizer was in the medical market. I ask you is Pfeizer in the anesthesia equipment market in the United States?

A I think they are in the anesthetic drug market, but they are not in the anesthesia gas market with which we are familiar.

Q Do you know if they are in the American market?

A I don't know.

Q I believe you testified that Howmedica was in the medical market. Is Howmedica in the anesthesia equipment market in the United States?

A I don't know.

Q Do you know if they are in the inhalation therapy equipment market?

A I don't know.

Q I believe you testified that Associated Hospital Supplies was in the medical market. Do you know if Associated Hospital Supplies is in the anesthesia market?

A I don't know.

Q In the inhalation therapy market?

A The same answer.

Q I believe you stated that CNA, which is an insurance company, had entered into the medical supply market.

A Right.

Q I ask you is CNA engaged in the anesthesia equipment market in the United States?

A Not to my knowledge.

Q Is CNA engaged in the inhalation therapy equipment market in the United States?

A Not to my knowledge.

Q I believe you stated that General Electric was in the medical market.

A Yes.

Q Is General Electric in the anesthesia equipment market in the United States?

A Not to my knowledge.

Q Is General Electric in the inhalation therapy equipment market in the United States?

A The same answer.

Q Did you state that International Utilities was in the medical market?

A Yes, I did.

Q Is there a National Utilities in the inhalation therapy market?

A Not to my knowledge.

Q Are they in the anesthesia equipment market?

A Not to my knowledge.

MR. THURMAN: Can we have one minute, your honor?

JUDGE BARNES: Yes.

MR. THURMAN: We have no further questions, your honor.

JUDGE BARNES: We will take up Commission Exhibit 301 at a later date.

Mr. Topkis.

MR. TOPKIS: Shall I redirect, your honor?

JUDGE BARNES: Yes.

REDIRECT EXAMINATION

BY MR. TOPKIS:

Q You have just been answering, Mr. Smith, as to the activities of a number of companies that it is not to your knowledge that they are engaged in the anesthesia equipment business, or the inhalation therapy business.

A Yes.

Q Is it possible that they are in and you don't know about it?

A Yes.

Q You mentioned the activities of a company called Howmedica.

A Yes.

Q Is that by any chance a spin-off from a company

called Howmed?

A I think so, but I am not sure.

Q And Howmed is an aluminum company, isn't it?

A Yes.

Q World wide proportions?

A Yes.

Q French ownership?

A Yes.

MR. THURMAN: Objection, leading.

JUDGE BARNES: These are very leading.

MR. TOPKIS: I am sorry, your honor.

Q You were asked, Mr. Smith about the entry of Air Products into the United Kingdom in the late 50's. Do you remember those questions from Mr. Thurman?

A Yes.

Q Were there any particular circumstances in existence at the time that Air Products entered the United Kingdom industrial gas business which in any way in your judgment had some impact on their success or lack thereof?

A Yes, indeed.

Q Will you tell us, please, what they were?

A The first factor was that BOC at the time occupied, had 98 percent of the existing market in industrial gasses.

Now, this is because our only competitor was a tiny company which operated up in the northwest corner of the

country, and operated only in that area.

Now, the result, at least in my view, the result of that situation was that the company was fat and slack, and was much more concerned about its production that it was in looking after its customers. And, of course, it pays a penalty, as every company would in that situation, that there was as a result quite a section of the customers who were just begging for another competitor.

The second point was that there was at the time a good deal of discussion going on in parliament about the forms that British legislation should take in providing additional competition. And the result was that as I know personally, our government gave direct encouragement to Air Products to enter the UK market.

JUDGE BARNES: Was this legislation or discussions of legislation dealing only with your market?

THE WITNESS: No, with the total competitive situation throughout the British industry.

A The next aspect of it was this: We had ourselves recently undergone a search by the monopolistic commission, which is a government agency in Britain, with the purpose of trying to discover whether in fact the company was earning too big a return as a result of its monopolis position.

Now, the report, the data that was used was that of

1954 when the company earned a return of 17 percent on its capital.

It was regarded as outrageously high, which maybe is a little ironic in today's circumstances, but regarded as outrageously high.

As a result the report laid certain restrictions on BOC, and in addition, published the whole of its cost structure, the whole of its price structure for every single product in industrial gasses. That was put in the form of a government report, and of course, was freely available to anyone who wanted to see it.

But even those factors in my mind are dwarfed by the fact that it was the critical moment at which tonnage, gas and the whole concept of provision to steel makers and so on of oxygen in vast quantities, it was just at that time when that concept was coming to Britain. In fact, the first tonnage plant put down in Britain was put down in 1955.

Now, the fact is that at that time BOC had not built a tonnage plant, and did not know how to build a tonnage plant. Whereas, of course, Air Products and indeed, the other American companies, had some four or five years lead on us in that situation.

They knew how to build a tonnage plant, and equally important, understood the commercial considerations which

flowed from tonnage oxygen supply contract.

Now, I have said repeatedly during this trial that the established competitor has an advantage when it comes to a tonnage supply scheme.

1954, '55, '56, there was no established supply in tonnage in Britain. So in effect, the whole of our competitor edge as a result of having the 98 percent market none of it could be brought to bear in this new situation which hit us which was the tonnage situation.

Air Product, not only came in all square with us in that field, but had the additional advantage of knowing how to build a plant and how to conduct the tonnage supply contract.

So in my view, my opinion, the situation open to AP in Britain in 1954 to 6 was entirely different from the situation facing BOC in looking at the American market in 1970, '71, '72, '73 and so on.

Q You say, sir, that up until '54, '55 BOC had not built any tonnage plants?

A Yes.

Q And beginning with that time, tonnage plants became quite common; is that correct?

A Yes.

Q What was the technical innovation which inspired this, if any?

A There was no real change in the technological process, in the process itself, there was no great change.

The real change took place in being able to scale up everything to two, three hundred times per day, which was the standard tonnage plant in those years.

Q And who was it that needed such enormous quantities, or such large quantities?

A The steel companies.

Q Why was that?

A They had finally realized the fact that they could produce steel more quickly and more economically by using a vast quantity of oxygen.

Q What did theoxygen replace?

A Well, it was only partly replacement andpartly enrichment.

The earlier forms included coke and coal and other forms of fuel.

Q Had there previously been in use a so-called Bessemer process for producing steel?

A Yes.

Q And did the new pocess come along which supplanted Bessemer process?

A The basic oxygen process.

Q That was a process which used all oxygen, is that correct?

A Yes.

MR. THURMAN: Getting back to leading questions again.

JUDGE BARNES: The oxygen method, was that German in origin in recent years?

THE WITNESS: Yes.

JUDGE BARNES: Or had they been using it for years?

THE WITNESS: In fact, I think it was first used at the close of the last war.

It was called the Lind Doenitz process, LD process which in fact started at the Herman Goering Works

in Austria, '42, '43.

Q You mentioned, I think, that A.P. Air Products was able to build a tonnage plant, its first tonnage plant in the United Kingdom by reason of an arrangement it had with Esso, which I take to be Standard Oil?

A Yes.

Q Is that an American company?

A That's right.

Q Can you tell us, please, who represented Esso in these negotiations?

A Mr. Peter Laister, my colleague.

MR. TOPKIS: And now you know what he meant by clean up, your Honor.

Q The moral of the story being if you can't lick them, join them.

Now, you mentioned before, sir, that you regard sulphur dioxide as an industrial gas?

A Yes.

Q Are there any other gases such as sulphur dioxide which you treat as within the industrial gas category?

A Well, outside the ones we have gone through in air separation, there are carbon dioxide, carbon monoxide, some of the fuel gases, propylene, and dipropylene.

There are a whole range of those sort of different mixtures.

Q How about the freons?

A Yes, there are number of refrigerant gases like Freeon.

There is a range of an ything up to a dozen different gases of the freeon type.

Q And you include them within the category of industrial gases?

A Yes.

Q Now, you mentioned that you entered the Fiji market, is that correct?

A Yes.

Q Did you do that de novo?

A We did that by acquisition.

Q And New Guinnea was an acquisition?

A Yes.

Q Indonesia was de novo?

A Yes.

Q When was that?

A In 1972.

Q Would you regard the Indonesian market as comparable to the American market in industrial gases?

A No, hardly.

Q Could you expand on that just a little bit?

A The indonesian market is a tiny market because y industry in Indonesia still has to be developed.

The state of the industrial gas industry is formally ruled by the state of the general industrial development of a country.

And I don't think Indonesia or many of these other examples could be described as being industrially developed countries.

And consequently, the industrial gas business could not be described as a developed industry.

Q When you entered South Africa in the twenties, you said?

A Yes.

Q Was that de novo?

A Yes, it was.

Q Did you enter on a tonnage basis?

A No.

There was no such thing in those days.

Q What did you do?

I think you sent a couple of men out with some money?

A That's right.

We sent a couple of men out with some money and some technology.

And the market, of course, was tiny. I doubt if in those first five years taken together they sold more than a million rands of gas.

Q A million rands, r-a-n-d?

A Yes.

Q That is South African currency?

A Yes.

Q How does the rand compare with the dollar or the pount?

A Well, it is roughly half of a pound sterling.

Q I see.

Let me just ask you an overall question.

Would you regard the economies of Rhodesia, Australia when you entered it, in India when you entered it, Hong Kong, when you entered it, Singapore, when you entered it, New Guinea when you entered it, Italy, Thauland, Bangladesh, as being at all comparable with the economy of the United States today?

A No, of course not.

Q When you entered Fiji, did you find yourself facing Union Carbide, Air Products, Chemetron orLiquid Carbonics?

A No.

MR. THURMAN: Objection, your Honor. Every question has been leading.

Who did you meet in Fifi? What did you do?

I think Mr. Topkis is capable of asking direct questions.

JUDGE BARNES: Who was your competition in Fiji?

Q What was your competition in Fiji?

A I think it was a Chinaman.

Q Now about Bangladesh?

A Well, there is no competition which has emerged as yet.

Q Okay.

Could you compare for his Honor the competition you faced in any of these countries we have been discussing with the competition which you would face in the United States were you to enter the industrial gases field?

A No.

There is no comparison.

Q You were asked by Mr. Thurman whether BOC itself had sold any plants to steel, chemical or glass companies in the United States, and you answered no.

Do you recall that testimony?

A Yes.

Q Through the Airco joint veture did you make any such sales?

A Yes, we did.

Q You were asked by Mr. Thurman about your talks with Chemetron, and he showed you, I believe, Complaint Counsel Exhibit 225, a memo of yours or a letter of yours to Mr. Allen Perham, dated January 20, 1970.

Do you recall that, sir?

A Yes.

Q I direct your attention to the last paragraph of that letter.

A Yes.

Q And I also ask you whether --

MR. TOPKIS: Perhaps I may show your Honor a copy of it so you may follow along.

Q Now, subsequent to that letter, were the discussions with Chemetron revised?

A No, certainly not.

Q Thank you.

Subsequent to the Perham-Greenfield report they were not revised?

A That's right.

Q You were interrogated a little bit about whether you had ever -- about what you had testified at your deposition in the investigational hearing.

I will ask you whether you were then asked these questions by Mr. Eagan of the commission staff and gave these answers, and I am reading from page 249, line 16:

"Question: Mr. Smith, is that a correct statement of your testimony, that the executive committee considered these three companies?"

MR. TOPKIS: And the three companies referred

to, your Honor, I believe, were Airco, Burdett and Chemetron -- two Burdetts and Chem etron.

"Answer: I would only add, in fact already stated, that the other alternative of starting from fact we ruled out very firmly as a result of thd survey.

"Question; Yes, I understand that.

"Answer: Having put that aside, it is certainly my testimony we have considered, discussed other companies including the three which you mentioned.

"Now,I have indicated the criteria which we would apply.

"Another criteria is that none of the companies that you mentioned are in the tonnage business except for Big Three.

"These criteria rule s avenues for BOC's expansion in North America.

"Question: You did not believe you could take one of the companies, whether it had a tonnage business, and establish a foothold and expand?

"Answer: No.

"Question: Why not?

"Answer: They do not meet the criteria, regional companies, not national companies."

Were you asked those questions and did you give those answers?

A Yes, I did.

Q And were those answers true when you gave them?

A Yes, they were.

Q And are they true or false today?

A They are true today.

Q You were asked some questions about Mr. Perham's responsibilities in connection with opportunities in the United States.

And you said, I believe, that he did not have responsibility for acquisitions in the United States?

A Yes, I did.

Q Would you explain to us exactly what his responsibilities were?

A Yes.

We asked Allen Perham to act as a listening post on behalf of the group in the North American situation.

I might add that we had a similar listening person in Japan and in Beirut.

Now, we didn't attempt really to define the range of opportunity.

What we said was if something occurred which you think might be of interest, the gorup, advise us in London and we'll talk about it.

What might happen to be of interest, the

group, ranged across a whole series of things.

It ranged across the possibility of some new product, some new technology, even some new managerial resource, some new manager that we might find that would be useful and good for us in the group, some new financial resource, as well as the possibility that there was some company which would be available to us and would fit our businesses.

Industrial gas was closed off because we had already closed our minds to it, but certainly in welding, in high vacuum, in the other businesses, in which we were engaged at that time.

Q Going back for a moment to Dr. Albert Moeller, he was employed, the record here reveals, he testified and you in fact were here when he testified --

A Yes.

Q -- that he was employed by BOC from '68 or thereabouts until 1970, I think.

A That's right.

Q And did Dr. Moeller, during that period, ever propose to BOC an opportunity in the industrial gases field?

A Not to my knowledge.

Q Now, you were asked by Mr. Thurman whether you might possibly have acquired another company in the industrial

gases field?

A Not to my knowledge.

Q Now, you were asked by Mr. Thurman whether you might possibly have acquired another company in the industrial gases field and -- other than Airco, and you responded, yes, possibly we might have?

A Yes.

Q Under what circumstances would you possibly have acquired, let us say, Big Three?

A It is difficult to say.

It's difficult to envisage it. But let's suppose Big three had come alongand said -- it didn't happen and I can never imagine it happening.

But let's sup-ose they came alongand said, look, we want toexpand and therefore we would like to have a chat with you about the possibility of a share exchange or something, so that we, Big Three, might have some interest in other parts of the workd and, you, BOC, might be interested in a portion of the equity in our company here in the States.

Now, of course we would sit down and talk with them. We would talk with anybody who came and -- who came along and said they wanted to talk with us.

It's a possibility. In fact, I don't regard

it as an ything more than that, and a purely hypothetical one at that.

Q Would you possibly be willing to acquire a Union Carbide if they were nice enough to come to you and offer themselves up?

A We'd talk about it happily.

Q Do you make the same statement about General Motors?

A Well, one could go too far.

Q All right.

Q Now, you testified in Mr. Thurman's questioning that in 1970 your Canadian subsidiary, Canox, would have been interested in acquiring the Niagara Falls plant of Burdett of Cleveland?

A Yes.

Q At that time was Canox capable of supplying itself with industrial gases, or did it have to go elsewhere to supply itself?

A It did not have enough capacity at an economic price to satisfy their customers' requirements.

They were buying the product in from other people.

Q From whom?

Do you happen to know?

A Yes. Mostly from Union Carbide.

Q And was Union Carbide one of their principal

competitors?

A Yes, they were.

Q And you thought it might be a good idea for Canox to acquire this plant?

JUDGE BARNES: These questions are leading.

MR. TOPKIS: I'm sorry. I am leading, your Honor.

Withdraw the question.

Q Did you approve or disapprove this idea?

A I approved it.

Q Would you tell us why?

A Yes.

I am a member of the Canox Board, and I could see that from Canox' point of view it would be an advantage to have that large source of liquid product which would enable them to fulfill their customers' requirements without having to go to a competitor.

Q Do you happen to know how far from the Canadian border the Burdett plant at Niagara Falls is?

A It's very close.

I don't know precisely. I know it's very close.

Q When you say very close, do you mean a few miles or a few hundred miles?

A I think it's a few miles.

JUDGEBARNES: Wo-ld there be a duty or tariff on importing into Canada product?

THE WITNESS: Yes, there would.

But because of the scale effect of that large plant in N iagara Falls, they could infact still get liquid from the plant delivered to them in Toronto at a little less than the price they were currently having to pay for their additional supply.

Q You testified in response to a question from Mr. Thurman American Cryogenics was offered to Luquid Air and was not offered to BOC?

A That's right.

Q Do you have any explanation of that?

A Oh, no. Only rumor.

Q To your knowledge, are any companies comparable in size to American Cryogenics available today?

A Not to my knowledge.

Q Do you know of any company engaged in the sale of industrial gases in the United States at a stage above that of plain distributor which has a plant as small as Canox'?

A I don't think I do, no.

Q You testified that BOC has a high proportion of the business in oxygen therapy equipment in the United Kingdom, is that correct?

A Yes.

Q What do you mean by oxygen therapy, sir?

A A --

Q Or is that a subject not of your expertise?

A Well, to answer it first, what I understand by it, I understand by it the restoration of health by the use of oxygen.

Q Okay.

MR. TOPKIS: Thank you very much, Mr. Smith. I have concluded.

JUDGE BARNES: Mr. Thurman, any more questions?

RECROSS-EXAMINATION

BY MR. THURMAN:

Q Mr. Smith, on redirect I believe you stated that you sold plants in conjunction with Airco to U. S. steel companies?

A Yes.

Q What companies did you sell these to?

A I would like to refresh my memory.

It was a steel company with which -- which was a customer of Airco.

Now, it was Fairfield. I can't remember the name of the company. It was in Fairfield.

That's all I know.

Q Did this plant carry the BOC name?

A It carried the joint venture name, BOC-Airco Joint

Venture.

Q Then, U. S. companies don't have an affinity of buying from foreign companies, is that right?

A I beg your pardon?

Q The U. S. companies did not want to buy from a foreign company or didn't prefer to.

They really don't mind buying from a foreign company?

It had a BOC name on it, is that correct?

A I never for a moment suggested that American companies have any bias against foreign-produced products.

Q I believe you stated they wanted to stay with equipment they are familiar with and wouldn't want to go to a foreign company for equipment?

A I said that was a natural reaction.

Q Liquid Air sells plants in the United States, do they not?

A Yes.

Q The French company, L'Air Liquide --

A To be more exact, it's Canadian Liquid Air which sells products in America.

Q It's still a foreign company to us.

A The Canadian Liquid Air worked to American Standards.

Q How about Linde of Germany?

Don't they sell plants to American companies?

A Yes, th ey do.

Q In this country.

A Yes.

Q Does BOC compete with Linde and Air Products, Messer-Griesheim, Linde AG,and AGA and L'Air Liquide all around the world, industrial gases?

A Not all of them in every place, b ut we meet some of them everywhere.

Q Who are BOC's competitors in Brasil?

A The major part of the industrial gas market in Brazil is held by a subsidiary of Union Carbide.

Q Is Brazil an industrially developed market?

A Developing rapidly.

Q I believe you stated that Chemetron talks were not resumed after the Perham-Greenfield study.

Do you know why?

A Oh, very well.

On our side the Perham-Greenfield study had confirmed what we expected to hear, which was that to get a viable position in the American market would be extremely difficult and extremely expensife.

To add to that, the discussions which were at a very preliminary stage, which John Williams held in Chicago, showed that at very most all of Chemetron was interested in disposing of was a minority interest.

But of course that was still at a preliminary stage.

We had had no discussions on market share, the possibility of expanding Chemetron, and a hundred and one other exercises which we would have had to have gone through before we would have arrived at any proposal to acquire even a minority part in Chemetron.

There was no case for doing any further activity on the possibility and we closed it off.

Q Would the joint venture with Chemetron serve the same purpose?

A Not at all.

Q Industrial gases?

A Not at all.

Q Did you want to have a joint venture with Chemetron?

A Yes -- no, we didn't.

Q Did you seek a joint venture with Chemetron?

A I've tried to explain that we merely had some preliminary discussion.

And an enormous amount of work would have been acquired thereafter before we had reached any conclusion at all.

It never got referred even to BOC's board.

That was the nature of the discussions.

Q Was this after the Parham-Greenfield report?

A It was -- I think, in fact, the report itself was published within days after Williams, John Williams' discussions in Chicago.

I think that's the chronological order of things.

Q Referring to Ray Williams, do you have a Ray Williams employed with BOC?

A Used to have.

Q Was he employed in 1972?

A Yes, he was.

Q What was his position with BOC in 1972?

A He was a seniro executive in our Medishield Limited operation in London.

Q Were you aware that in 1972 Mr. Ray Williams contacted the -- Mr. Chune of Ch emetron and proposed to hamdle joint venture of BOC And Chemetron to market medical gases and related equipment in the United States?

A I was aware that he was goingto see Chemetron. I was not aware of the nature of the discussion he was going tohave with Chemetron.

Q Were you aware that Mr. Williams flew to Chicago in July of 1972 and had these discussions?

A I can well believe it. I wasn't aware of it at the time.

Q Were you aware thatRay Williams or other representa-

tives of BOC have been to Chemetron five times within the last two years?

A No.

Q To discuss participation in joint ventures?

A Well, you are telling me that was thesubject of their discussions.

I wasn't aware, and neither was I aware that he had gone five times to see Chemetron.

Q When you say Chemetron wasn't discussed again after the Perham-Greenfield report, or after this first discussion, then to your knowledge it was not discussed, but it is possible it was discussed by people, representatives from BOC, isn't that correct?

A I'm absolutely certain that the discussion which John Williams had in Chicago on the possibility of some acquisition of Chemetron stock, I'm certain there was no development of that discussion thereafter.

May I just expand on that a little?

What happened in the Medisheidl management is another thing.

I don't doubt they did some of these things. I don't doubt they dreamed their dreams, and I was happy thatthey should do so, in the full knowledge that when it came to the crunch and they wanted money and they wanted to pursue a particular part, they would have to come to

the BOC board, and it's at that point, when I start getting a proposal in front of me, with hard and fast recommendations and terms and so on, that I get really interested.

And that's when judgment has to be exercised.

Until that point, I don't mind very much what people are doing.

Q What is the -- what was the size of American Cryogenics at the time of the L'Air Liquide acquisition?

A I'm sorry, I don't know.

Q How do you know that there was no other companies of that size available after that acquisition?

A I think that the desk study that was produced at the time of the Perham-Greenfield report went into some considerable detail as to the inhabitants of the American industrial gas market.

Now, as I was saying yesterday, in our analysis of that market, there are three very large bulk producers at one end of the market, and a host of small distributors at the other end, and a small number of companies inhabiting themiddle ground.

Now, if you'd asked me, I would have said the American Cryogenics Company was one of that small number inhabiting the middle ground.

As far as I know, the other people in that

middle ground are not available or at least would not be of interest to BOC.

Q The Burdett Companies were not available at that time?

MR. TOPKIS: At what time?

MR. THURMAN: Prior to acquisition of Airco stock.

A I'm aware under John Williams' authority, there were discussions with Burdett Norristown.

I was aware subsequently that there had been discussions under the authority of John Williams of our people with Perkins of Norristown.

John Williams subsequently reported this to me, that it was a -- it was of no significance at all, that it was a dead duck andhe would not be the slightest bit interested in carrying the talks further.

Q I guess we are not on the same wave length.

On redirect you were asked if you knew of any companies the size of American Cryogenics was available.

And I believe your answer was no, you didn't know they were available, or was that answer that there was not anybody available at that size?

A The answer was intended to indicate that to my knowledge there was no company of the size of American Cryogenics which I put in the middle ground available for purchase.

Q I believeyou testified BOC was interested in the Niagara plant of Burdett of Nortistown to supply -- of Cleveland, to supply the Canox operation.

A I had testified that Canadian Oxygen was interested in acquiring the company.

Q This is semantics.

Canadian Oxygen is owned by BOC.

A You wouldn't mind if I disagreed with you.

Q BOC doesn't own Canox?

A That is true.

But your statement that it's the same thing, I do not agree with.

Q You will agree to the ownership?

A Yes.

Q Okay.

What plans did BOC or Canox have for the present customers located in the United States of that plant?

A I don't doubt that if the Canox hope of acquiring that plant had been achieved, they would have had plans in hand to have satisfied the customers' requirements.

For all I know, that plant at Niagara Falls was only loaded to the extent of fifty or sixty per cent, anyway, and had spare capacityavailable to Canadian Oxygen for sale to their own customers.

This is wh y I insist, if I may say so, on this

differential.

It is not a matter of BOC interest. It is a matter of Canadian Oxygen interest.

Q Is the tariff of industrial gas going into Canada identical to the tariff of the industrial gas coming into the United States out of Canada?

A No.

I understand it is different.

Q Which is higher?

A I am told that imports into Canada is higher than imports into America.

Q Getting back to Chemetron aminute, did they only want to sellyou a minority interest? Is that a minority interest of wha-, forty-nine per cent?

A My recollection of what John Williams reported to me as a result of his discussions in Chicago was that they were interested in selling between twenty and thirdy per cent.

Q I believe you testified that you include sulphur dioxide industrial gas.

Does BOC produce sulphur dioxide?

A No.

Q Does BOC market sulphur dioxide?

A I think we market a little. It's such a marginal activity --

Q Extremely small?

A Oh, yes.

Q Does BOC produce Freeon?

A No.

Q Does BOC market Freeon?

A Yes.

Q What percentage, say, in the UK does Freeon account for in their sales?

A Oh, a tiny percentage of total industrial gas sales, less than one per cent.

Q I believe you incoluded fuel gases in your testimony.

Does BOC produce propylene?

A No.

Q Does it sell propylene?

A Yes.

Q What percentage of industrial gases in UK does -- is accounted for within BOC by propylene?

A Less than one per cent.

Q Did you include dipropylene?

A To save time. all those little gases together amount toless than one per cent.

MR. THURMAN: We have no furtherquestio-s, your Honor.

MR. TOPKIS: Just a couple, if I may, your Honor.

JUDGE BARNES: Proceed.

REDIRECT EXAMINATION

BY MR. TOPKIS:

Q You mentioned that the joint venture sold plants to a company in Fairfield?

A Yes.

Q Fairfield where, do you know?

A Fairfield, Alabama, I think.

Q Would the name United States Steel Company refresh your recollection?

A That's right, yes.

Q And the joint venture that sold those plants to U.S. Steel, that was the American corporation?

A That was the American corporation.

Q And its name was Airco-BOC?

A Yes.

Q You were asked a question or two about Brazil.

I would ask you, sir, is the Brazilian economy today or was it in November or December of 1973 as developed as the United States?

A Certainly not.

Q But Brazil's economy has a low or a high growth rate today?

A High growth rate.

Q Among the highest in the world?

A Yes, indeed.

MR. TOPKIS: No further questions.

Thank you very much, Mr. Smith.

MR. THURMAN: We have no further questions.

JUDGE BARNES: Thank you very much for your testimony.

THE WITNESS: Thank you very much, Judge.

JUDGE BARNES: We will take abbut a ten-minute recess.

(Recess taken.)

(Continued on next page)

JUDGE BARNES: Let's resume.

VINCENT GIORDANO

having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TOPKIS:

Q Mr. Giordano, I understand that you have a bachelor's degree from Harvard and a law degree from Columbia?

A That's right.

Q Got out of law school in 1959?

A That's right.

Q What did you do then?

A Went to work for the law firm of Sherman and Sterling in New York City.

Q How long did you stay with them?

A Approximately four years. I left in the beginning of 1963.

Q To take what position?

A I joined the law department of the then Air Reduction Company.

Q A company now known as Airco?

A Right.

Q Would you trace for us your history of Airco?

A I was in the law department for two years until about the end of 1965. I then joined a newly created

division called the Airco Distributor Products Division which was a predecessor — one of the predecessors of our current welding division.

I was the vice president of that division and then executive vice president. That division's responsibilities included the marketing of industrial gases and welding and cutting equipment through a network of distributors inthe United States. I was in that division for two years. I was made a group vice president of the corporation in 19-- January, 1967. My responsibilities included the industrial gas division of Airco, the welding division, the Cryogenic equipment division and the medical products division.

I was group vice president for approximately five years and I was elected president and chief operating officer of the company in December of 1971.

Q Do you still hold that position, sir?

A Yes.

Q Are you also a director?

A Yes.

Q Are you connected with any other company?

A I am a director of the Inmont Corporation.

Q You wouldn't, by any chance hold any position on the board of British Oxygen Company?

A Yes.

Q I am going to show you a copy of RAX7 which, I believe, is the Airco annual report for 1973; is that correct?

A Yes.

MR. TOPKIS: Your Honor, it is an Airco Exhibit but I would offer it in evidence at this time just so we have it.

JUDGE BARNES: Any objection, Mr. Thurman?

MR. THURMAN: I have no objection.

JUDGE BARNES: Does Airco have any objection?

I will receive RAX7 in evidence.

(RAX7 was received in evidence.)

Q Now --

MR. THURMAN: Your Honor, we never did get any of Airco's --

MR. WOLLEN: Mr. Thurman, they were delivered to you six weeks ago. We have an extra annual report also.

MR. NEWCOMB: I gave you one, personally.

MR. THURMAN: '73?

MR. NEWCOMB: Yes.

MR. THURMAN: I don't have a copy. I think you sent them to the secretary's office and I never did get them.

BY MR. TOPKIS:

Q I would like, if I may, Mr. Giordano, to run through this document with you and ask you some, I hope, clarifying questions about it.

First, I would like you to turn to the page on which the welding products division is featured. I think it is the fourth page over; do you see that, sir?

A Yes.

Q I would ask you there, listed under the products, Oxyacetylene, I suppose that is a combination of oxygen and acetylene?

A Yes.

Q What is oxy-MAPP?

A MAPP is a fuel gas. It is a combination of a number of constituents of natural gas. It is a by-product of a petrol chemical process and it behaves in a manner similar to acetylene in the cutting and welding process.

Q Going down further, I see something called Aronson positioners, what are they?

A That is a piece of equipment on which you place work that you intend to weld and it alters the position of the work to make the welding easier, to enable the welder to weld, for example, in a single downhand position.

Q How about turning rolls, I suppose they are also designed to move work around?

A Yes.

Q How about vibratory stress relieving equipment?

A That is somewhat different. That is to take the material and remove stresses within the grain boundaries of material.

Q And I see further down on that page that you have eight plants around the country manufacturing these products.

MR. THURMAN: Objection, Your Honor. There is no relevancy.

JUDGE BARNES: Welding products were out of the market but --

MR. TOPKIS: I just want to give Your Honor a picture of Airco and an understandable one. There are some ambiguities here.

A That's correct.

Q Do I gather that you sell these products throughout the world, is that whatthat language, further down on the page means?

MR. THURMAN: Objection, Your Honor. He can ask him where he sells them.

MR. TOPKIS: Okay.

A We sell most of these products within the United States. We do export some of these welding products but not all.

Q Going over a couple of pages, please, to -- several pages, actually, to the Airco Cryogenics Division, in broad terms, could you tell us what the Cryogenics Division is and what it makes and what it sells?

A Well, the name implies that it makes a line of equipment employing Cryogenic technology.

Q What is cryogenic technology?

A That is the science of low temperature. It manufacturers equipment for the industrial gas industry, pumps, vaporizers, compressors. It manufacturers equipment for the liquified natural gas industrial; pumps, vaporizers, compressors. It manufacturers equipment for the food freezing industry; freezing boxes and tunnels.

It also employs this same technology, technology on rotating equipment for some other industries as well.

Q I see, further down or over on the right on that page, under the heading "markets" industrial gas, food, liquified natural gas; what does that mean, sir?

JUDGE BARNES: These are the industries that use these products; is that right?

THE WITNESS: Yes, sir.

Q I see. Okay.

How does the industrial gas industry use the products of the Gryogenics Division?

A Well, for example, the industrial gas industry manufacturers, for example, liquid oxygen. That liquid oxygen is moved through pipes within the plant and pumps for the movement of that product are manufactured by this division. The division also makes vaporizers which are used to vaporize the liquid oxygen into gaseous oxygen, the form in which it will be used by many of the customers.

Q Coming over another couple of pages to the Airco Industrial Gases Division, I see there in the second sentence of the text, the words "the lower sales volume was caused by the fewer number of liquified natural gas LNG plants for the public utilities industry." Does Airco construct LNG plants for the Public Utilities Industry?

A We did up until 1972 but we dont do that any more.

Q You went out of that business?

A Yes.

Q Over again, a few pages, we come to the Ohio Medical Products Division and I will ask you in connection with that, sir, what is ethrane?

A Ethrane is an anesthetic drug which was introduced by us at the tail end of 1972.

Q Is it sold in liquid form, gaseous form or what?

A It is sold in liquid form but it has a low vapor point and it is acutally vaporized in its use.

Q And administered as an anesthesia?

A As a gas anesthesia.

Q Is it termed a medical gas or what? What is it called?

A No. It is called an anesthetic agent.

Q There is reference in this report to medical gases; what are they?

A Medical gases include oxygen that is used in the operating room as distinguished from oxygen -- therapy oxygen used in a hospital room.

Medical gases include a small amount of helium, that would be attached to an anesthesia machine, carbon dioxide, nitrisoxide, I believe that's all.

Q How about cyclopropane?

A That would be classified in our sales as medical gases but in fact, it is an anesthetic agent.

Q Now, on the facing page from the material devoted to Ohio Medical Products Division, I see a gentleman in a horizontal position and somebody is leaning over him, do you see that?

A Yes.

Q Now, the device on the left, what is that?

A That is an anesthesia machine.

Q I s that an Airco product?

A Yes.

Q And the cylinders that seem to be suspended from it, what are they?

A Two of them are nitrous oxide.

Q And the third?

A There appears to be a cyclopropane cylinder on the right.

Q Are you familiar enough with this equipment, Mr. Giordano, to tell his Honor what the various parts of it -- what functions they perform?

A I'll try.

Q Okay.

A If you will lean forward, Your Honor --

MR. TOPKIS: Just lie back.

A (Continuing) First of all, this is a table onto which you will find a number of gadgets. The columns on the top are gauges that measure the amount of various gaseous products being administered to the patient. It is not clear from this table what the anesthetic agent is but assuming it is ethrane, which would be attached in the form of a small bottle and vaporized into the piping system of the table, the amount vaporized and the volume would show on the gauge. The same would be true of the nitris, the cyclopropane or any of the other medical gases attachable to this table. That is the soda absorber cannister.

Q The cylinder with the white material inside?

A Yes, it is a purification cylinder as the gas recycles back. This bag --

Q The black bag that the operator is holding?

A Yes, this fellow has a hand on the bag and that is to ventilate the patient and to reflect the patient's breathing. That is the mask and the breathing circuit.

What you don't see here would be a number of gauges and warnings that would tell the anesthesiologist whether or not he had any problems going on during the surgical procedure.

JUDGE BARNES: Now, the soda, does that come into play on the return circuit?

THE WITNESS: I believe it does.

JUDGE BARNES: That absorbs the gas that has been used?

THE WITNESS: Impurities. When it is used up, it is disposed of.

JUDGE BARNES: Is the gas used up in the process?

THE WITNESS: Well, most anesthesia is given an open circuit which means that the gas is exhaled and out, it doesn't go back to the patient.

There are some examples of closed circuit anesthesia, not too frequent.

Q Where you reuse the same gas over and over again?

A The same anesthetic gas, yes.

Q All right, sir.

Let's go on to the Airco Alloys Division. In broad terms, what does that division make and sell?

MR. THURMAN: Objection, relevancy.

JUDGE BARNES: Doesn't the report set it forth sufficiently?

MR. TOPKIS: Yes. I am sorry, Your Honor. I will withdraw that. That is clear enough.

Q The Airco speer, carbon graphite division, in broad terms, what is that stuff?

MR. THURMAN: Objection, relevancy.

JUDGE BARNES: Well, I don't think that is relevant. Is that relevant to this proceeding?

MR. TOPKIS: I just want to develop, Your Honor, that Airco is a quite sizeable, quite diversified enterprise. I, in all candor, am not familiar with all of its operations and I thought Your Honor might like to know in what fields it is engaged.

MR. THURMAN: We will stipulate that it is diversified.

JUDGE BARNES: The annual report probably makes that clear enough.

MR. TOPKIS: All right, fine, Your Honor.

JUDGE BARNES: Was Ohio Medical Products an

acquisition by Airco?

THE WITNESS: Yes. But, a long, long time ago. I am guessing but it is probably pre-second world war.

BY MR. TOPKIS:

Q Talking now about Airco, Mr. Giordano, I think you were here when Mr. Leslie Smith was testifying earlier in the day.

A Yes.

Q Mr. Smith said Airco is very large in the helium business; is that statement accurate?

A Yes. We are large in the helium business.

Q And you walk tall.

Now, let me be a little more precise.

Do you manufacture helium?

A No, we do not.

Q You market it?

A Yes.

Q Are you one of the largest marketers of helium in the United States?

A Yes.

Q Are there any -- well, let me ask you this:

As you use the term, what does the term industrial gases encompass?

A As we use the term industrial gases, we include all of the gases marketed or manufactured by our

industrial gases division.

Q Which would be, sir, I suppose, the atmospheric gases and let me ask you about some others; the fuel gases?

A Yes.

Q Acetylene, of course?

A Yes.

Q How about helium and hydrogen?

A Yes.

Q Carbon dioxide?

A Yes.

Q You sell carbon dioxide for what use?

A We sell it for a great number of uses. Some of the principal uses would be in the beverage industry, the carbonated beverages. In food freezing, food chilling. It is sometimes used as a blanketing gas, inert atmosphere and some of it goes into the welding industry for inert gas shielded welding.

Q Do you include mapp as one of the fuel gases, I suppose?

A Yes.

Q How about propane?

A We don't sell propane.

Q As you use the term, you include propane as an industrial gas?

A Yes.

Q How about propylene?

A Yes.

Q Are these various gases that we have been discussing made by the same or by different processes?

MR. THURMAN: I object to the form of the question. He doesn't sell or produce MAPP. So --

THE WITNESS: We do when it comes to MAPP.

MR. THURMAN: I mean, propylene. It comes outside of his expertise.

JUDGE BARNES: Can you rephrase the question?

MR. TOPKIS: Yes.

BY MR. TOPKIS:

Q The atmospheric gases, I think this record is clear is made by the same process. Does that generate any helium or is that by a different process?

A A different process.

Q Hydrogen?

A A different process.

Q CO 2?

A A different process.

Q Acetylene?

A A different process.

Q MAPP?

A A different process.

Q Propane?

A I am not familiar with propane.

Q Propylene?

A A different process.

Q These gases are different for the same purposes or different purposes?

MR. THURMAN: Objection.

These questions are leading the witness.

JUDGE BARNES: I don't think that is leading.

Has he suggested an answer to him?

MR. THURMAN: Well, if he asked what the uses are that would be a more direct question. He is suggesting that it is one or the other.

MR. TOPKIS: Is there a third possibility?

JUDGE BARNES: Is it used for the same purposes or different purposes or something else?

THE WITNESS: Some are the same and some are different.

Q Well, let's take the atmospheric gases; oxygen and nitrogen are used for the same or different purposes?

A Different.

Q Argon?

A Different.

Q Helium?

A The same as Argon in some applications and then

many other purposes which are different.

Q Hydrogen?

A Different.

Q Carbon dioxide?

A The same as helium and Argon for welding but different for most other purposes.

Q The same purposes being shielding or blanketing?

A That's correct.

Q And I don't suppose you use the fuel gases for the same purpose as you use nitrogen?

A No.

Q Now, in the selling of these gases, sir, to the degree you sell them, do you sell them to the same or different customers?

JUDGE BARNES: I think here we mean categories, don't we?

MR. TOPKIS: Yes, Your Honor.

MR. THURMAN: Your Honor, I hope you understand this. I am not going to understand this record. If he asked for what purpose each one are sold, I might understand it.

How can you make such a general category of all these gases when some are the same and some are different? I don't think the record will be clear.

Judge barnes: I think it would be as

meaningful for him to tell me to whom does he sell each one.

MR. TOPKIS: Fine.

BY MR. TOPKIS:

Q Would you tell us, sir, to whom you sell oxygen?

JUDGE BARNES: I suppose you are going on the brown shoe criteria.

MR. TOMPKIS: I will do my best.

Q To whom do you sell oxygen, Mr. Giordano?

A Do you want to ask the question previous to that or --

Q I will withdraw the previous question and ask you to whom you sell oxygen?

A To the steel companies who use it to make steel, the BOF process. We well it to a variety of people with furnace operations, glass making, aluminum smelting. We sell oxygen to customers who use it for cutting. The Oxyacetylene cutting process. Those are some of the major users.

Q What percentage of your oxygen do you sell to steel companies, in terms of volume?

A Are you distinguishing between tonnage oxygen or merchant oxygen?

Q Total.

A I don't have a number for the amount of tonnage

oxygen.

Q Okay.

How about nitrogen, to what kind of customers doyou sell that gas?

A Nitrogen is principally sold for blanketing operations. Oil companies, electronic applications, wherever an inert atmosphere is necessary. Chemical companies, oil companies, electronics companies.

JUDGE BARNES: Is this to prevent explosion?

THE WITNESS: Yes, an oxygen free atmosphere. It is a bit heavy and settles down.

Q To what customers do you sell Argon?

A Primarily for the companies that do stainless steel welding, that can include large customers like Pratt and Whitney, who do an enormous amount of welding or small fabricators.

Q Do I gather from what you say that it is used for the same purpose, that is, shielding, but in different processes from nitrogen?

A Nitrogen is not used in welding shielding. Nitrogen is used as a blanketing atmosphere over electrical circuits where you want to have an oxygen free atmosphere.

Q What about -- did I ask you about Argon?

A Yes.

Q Zenon?

A Zenon is a rare gas used in certain electrica applications sold in very small quantities.

Q Krypton?

A I don't recall the application but it too is a rare gas sold in small quantities.

Q How about helium, sir, to what kind of customers do you sell helium?

A Helium is used in welding for one of the inert gas shielding processes. It is used for leak detection, for determining leaks in pipes. A great deal of helium goes into ballons for both commercial and circus type uses.

Liquid helium is used for research, linear accelerator development laboratories.

Q How about hydrogen, to what kinds of customers do you sell hydrogen?

A Hydrogen is used sometime for annealing of steel. It is also used in chemical applications. It is used in some food applications.

Q How about carbon dioxide, sir?

A Carbon dioxide is sold primarily to the beverage industry and to the food industry. In the food industry, it is used for food freezing, food chilling and in some cases, food transportation.

Q Is it used also in welding at all?

A Yes, as a shield gas in inert gas shielded welding.

Q When you are doing welding, do I gather that there are various shielding gases that you can use?

A Yes.

Q Do you use the same equipment or different equipment depending upon the gas you are using?

A In most cases you will use different equipment, depending upon the gas you are using.

Q Now, the fuel gases, acetylene, to whom is acetylene sold?

A To the customers who cut and join metals.

Q How about MAPP?

A MAPP is sold primarily for cutting.

Q And do you use the same equipment when you are using MAPP and acetylene or do you use different equipment?

A You use different equipment.

Q How about propane?

A The equipment used for propane cutting would be identical or similar to the mapp cutting.

MR. THURMAN: I object and move it be stricken. He has nothing to do with propane.

JUDGE BARNES: That doesn't necessarily hinder his knowledge.

If he can answer the question, he can answer it.

MR. THURMAN: I would like a foundation of what

his knowledge is on propane.

JUDGE BARNES: What is your knowledge on it?

THE WITNESS: We sell tips and cutting equipment for the use of propane.

Q How about propylene, sir?

A Propylene is also used as a fuel gas, very similar to MAPP gas.

Q Does noe use the same equipment or different equipment?

A The same or similar to MAPP gas.

Q Now, do you sell all of the industrial gases, and I will ask it open-ended, in deference to my friends' likely objection.

Would you tell us, please, what kind of sales staff you use to sell these various industrial gases we have been discussing?

What I have in mind is, is it the same sales staff for all gases or different for different people?

A It is a different sales staff for different segments of the industrial gases and different sales staff for an industrial gas but to different segments of the market for that same gas.

For example, we have a special sales staff that sells tonnage gases. We have a sales staff that is responsible for bulk industrial-gases, bulk oxygen, bulk

nitrogen, bulk helium, bulk argon.

We have a separate sales staff that is responsible for selling industrial gases to small users either through a distributor network or our own outlets.

We have another sales staff that sells rare and specialty gases which we regard as a separate market.

Q Such gases are --

A Zenon, neon, krypton and mixtures.

Q Are these gases, these sales staffs, rather, all in your industrial gases division or are they in different divisions?

A They are not all in the industrial gases division. Most of the gases are sold through the industrial gases division. However, there is a sales staff in the welding products division responsible for selling industrial gases that are first connected with the welding or cutting process and secondly, sold through the distributors to the small users.

Thirdly, we sell oxygen, for example, through our sales staff in the medical products division.

Q Now, you used the term tonnage and the term bulk. Could you define for us, please, the difference -- define each of those terms, if you will?

A When we say tonnage gases, we are talking about the amount of demand for the gas by the customer that

would justify a plant being constructed adjacent to or near the customer. That plant would be devoted exclusively to the customer or a substantial portion of it woquld be devoted to the customer. Typically, the product is shipped through a pipeline to the customer's application point.

Q And how about bulk?

A When we speak of bulk, we are generally talking about the sale of product in liquid form to the customer. It is manufactured as liquid by us for the economies of distribution. For most of the customers, I would say better than 95 percent of the customers use the product as a gas. However, in that segment of the market for the reasons of transportation, we liquify the gas, ship it in bulk liquid form and then vaporize it at the customer's location.

Q Where do you do the liquifying, right at the point where the air separation unit is located?

A That is right.

Q And --

JUDGE BARNES: Who vaporizes, you or the customer?

THE WITNESS: We do, in the sense that we own the tanks. The vaporizer is connected to the tankthat we install at the customer's location.

JUDGE BARNES: You put in liquid and it comes out gas?

THE WITNESS: Correct.

The chain of distribution would be that we have ais separation column that in effect separates the air into its constituents.

The gas comes out of the column, let's say, oxygen, then it does into a refrigeration system.

There it is taken down by a cryogenic process to a temporature that liquifies it.

It is then pushed into a long tank car or put into a storage tank and stored as liquid. It is still a liquid.

It is put into the tank car and the tank car runs around and makes delivery of that product to the various customers and the various customers'station receives it from the truck as the customer needs it. It is vaporized and he uses it as a gas.

JUDGE BARNES: To maintain it in a liquid form, does this require that it be kept under pressure?

THE WITNESS: No, it is a vacuum tank. It is actually like a thermos bottle with an inner tank and an outer tank and a vacuum is maintained between the two.

Q So that by keeping the termperature very low, you keep it liquid, is that it?

A Yes.

Q The gas that is supplied to the tonnage customer, that is in gaseous or liquid form?

A In gaseous form.

The gas that goes to the tonnage customer goes directly off the air separation plant, pushed at high pressure through the pipe line down to the customer's steel plant, for example.

Q I think this may already be in the record but tell us who the typical tonnage users are.

A Armco Steel, Republic Steel, U. S. Steel, Bethlehem Steel.

Q What other kinds of customers other than steel manufacturers?

A Oil companies, chemical companies, copper companies, glass companies.

Q Any others?

A Not that I can think of offhand.

Q You were here duringMr. Smith's testimony when he talked about sometimes adding on merchant capacity to a tonnage plant.

Was he describing the American way of doing this as well as the British way?

A Yes.

That is the same principle that applies, and

that is, if we have a large steel company that needs, say, 200 tons a day of oxygen, we'll meet that demand by building an air separation plant but instead of sizing it at 200 which is the steel company's demand, we'll size it at three or four and that will give us an extra two or three hundred tons of oxygen which we can sell to the bulk market as well as the small user market as I described earlier.

Q Now, are there any gases othdr than the air separation gases which are sold in tonnage quantities?

A Hydrogen sometimes is sold in tonnage quantities.

Q Any others?

A You said air separation which includes nitrogen.

Q Right.

A Not that I know of.

There is no helium sold that way. Hydrogen is, CO2 is not to my knowledge.

That is it.

Q Okay.

Now, when you get a contract -- well, to begin with, does Airco have the capacity to build its own tonnage plants?

A No, we do not manufacture the air separation column itself.

Q What do you do when you get a supply scheme contract

with a steel company or a petroleum company or a glass company?

A The first thing our engineering department will do is, in effect, putting a schematic that will meet the customer's demand.

The column is only part of the plant. There is heat exchanging equipment, piping equipment, mechanical and electrical equipment.

Based upon their schematic of what they think will meet the customer's demands, they will then go out on quotes on the various components of the plants.

They will go out for quotes on a cold box and for compressors, heat exchangers and foundation costs.

Q And, having gotten all these quotes together, you are in a position to make a bid to a customer?

A That's correct.

Q Now, how do you decide whether you are going to add on merchant capacity?

A Well, that is a determination made by our study of the supply demand situation in the geographical location where the plant is required.

Q Do you, on occasion, decide not to add any merchant capacity?

A Oh, yes.

Q And conversely, do you on occasion build plants just to supply merchant -- to supply the merchant market

without a tonnage commitment?

A Yes.

Q When you build such a merchant plant, however, do you build it in a completely new market or do you build it in a market where you are already on the scene?

A We, in the time that I have been responsible for the gas business, have built very few plants in markets where we have not had a fair amount of existing business.

The few times that we have attempted to do that, it has taken entirely too long to load the plant and the return on investment for the project has been way below our standards.

Q When you speak of loading the plant, what do you mean, sir?

A If the plant is a 200-ton plant and it takes us eight years to get the 200 tons, we have loaded that plant far to slow.

Q Loading the plant means utilizing its full capacity?

A Yes.

Q I see.

Now, you said before that you have different staffs for selling tonnage deals and bulk customers and small users.

Why do you employ different staffs for those pruposes?

BEST COPY AVAILABLE

A Well, first of all, they are entirely different markets.

The type of customer and the amount of business you do with that customer varies significantly in the markets and, of course, that then determines the amount and type of selling expense that you can afford for that market.

In the tonnage market, the customers are buying large dollar volumes of your products, the application is very technical and requires strong technical support to the sales effort.

The bulk market, the dollar volume tends to be smaller, quite a bit smaller than the tonnage although the applications may be technical, the amount of technical support we can give is limited because the customers are not as big as, say, the tonnage customers.

In the small user market, there are hundreds of thousands of customers that we serve, buying very small quantities of these products and there we tend to provide a very small amount of service and in fact, most of that business, we handle through distributors.

Q To any degree, do you employ separate staffs to call on different users in terms of the specific gases which they are going to employ?

For example, do you have a special staff to

sell oxygen or nitrogen or zenon or CO2?

A Well, it is a mixture of both. We have what we call specialists that support the sales of various gases.

For example, there is a special sales and technical group supporting the sales of the rare and specialty gases.

There is a special marketing group that supports the sales of CO2. The applications tend to be different and the technologies are slightly different and it requires specialization.

Q Your people have to know the needs of their customers; is that right?

A Yes.

Q Does Airco bid on tonnage supply schemed all over the United States or only in certain parts of the United States?

A All over the United States.

Q Do you bid on tonnage supply schemes outside of the United States?

A No.

Q Do you sell merchant -- in the merchant field all over the United States?

A Yes.

Q Not outside the United States?

A No.

8

Q Now, you have mentioned that you employ different sales staffs for selling different products.

I am goingto ask you, are you familiar with the operations of Liquid Carbonic?

A Not intimately familiar.

Q Well, do you happen to know whether Liquid Carbonic has its carbon dioxide pperation in a totally separate division?

A They do and I am familiar with their operation.

Q How about Chemetron?

A Chemetron has a separate division that sells carbon dioxide called Cardox.

Q Now, another of your competitors is Air Products?

A That is correct.

Q Are they in the carbon dioxide business?

A Not in the United States.

Q How about Linde?

A They are not in the carbon dioxide business in the United States although they do produce some carbon dioxide as a by-product of one of their plants on the West Coast.

In fact, we buy that carbon dioxide.

Q And you market it?

A Yes.

Q What kind of plantis that, sir?

A I believe it is a flow off of a hydrogen plant of Fontana in California.

Q How about Hydrogen, sir, do you make that yourself or do you buy it?

A We make it.

Q Do you also buy it?

A We will buy it in parts of the country where we do not make it.

There are limitations as to how far it can ge shipped, economically.

Q When yousay you make hydrogen, what do you mean by that?

Do you start from scratch or do you take a feed stock?

A We take a raw hydrogen feed stock, clean it up to pure hydrogen and liquify it.

Q From whom do you buy that stock?

A The Sunolan Company.

Q What business are they in?

A The petrochemical business.

I am not sure of what chemicals they make.

Q This hydrogen is a by-product of their process?

A Yes.

Q You pick itup in a relatively impure form and you purify it and liquify it?

A Yes.

MR. TOPKIS: Have I sinned again?

MR. THURMAN: Not again, continuously.

MR. TOPKIS: I waas just trying to summarize, your Honor.

Q Carbon dioxide, sir, how do you produce that if you do produce it?

A We buy, rather than produce, most of the carbon dioxide we market.

In the two places that we do produce it, we buy raw CO2 from a -- as a by-product from an ammonia process, clean it up and liquify it.

Q The companies which are making ammonia, what kind of companies are they?

A They are either chemical companies or oil companies. That would include Union Oil, Allied Chemical, Monsanto.

Q These are all companies that are making ammonia and simultaneously producing carbon dioxide as a by-product?

A Correct.

Q To your knowledge, the other gas companies do the same thing that you do, that is to say, buy carbon dioxide?

A Well, no.

In the case of Air Products and Linde Division of Union Carbide, they are not in the CO2 business as we are.

Q But those which are in the CO2 business --

A Yes, they would either produce a by-product that had as its source ammonia plant.

Q Incidentally, sir, just to give this record an element of feel for what we are dealing with, as we came in outside today, there was a truck parked outside on a building project with cylinders on it. Perhaps you saw it, thestandard cylinders one sees on construction projects all of the time.

What does one of those cylinders weigh?

A I would guess it weighs 200 pounds or a little less.

Q What is the difference between its weight full or empty, if it is filled with oxygen?

A It has 244 cubic feet. It can't be more than 10 pounds or thereabouts. It would be one-one-hundredth of a ton.

Q Is that in gaseous form?

A Yes.

JUDGE BARNES: Are those the cylinders that stand about four feet tall?

THE WITNESS: Yes, steel cylinders that are filled to about 22 to 2500 pounds per square inhc.

There is quite a bit of product in there.

Q When you are a successful bidder on a tonage supply scheme and need thecold box, from whom do you purchase the

cold boxes.

A Well, over the years we have purchased from many people. We have purchased from BOC, from German Linde, we have purchased from L'Air Liquide, we have purchased from German Messer-Griesheim, we have purchased from Air Products, going back a number of years.

Q Incidentally, speaking of German Linde, do they have a sales office in the United States, to your knowledge?

A Yes.

They have a sales office and an American Company called Lotepro.

JUDGE BARNES: A sales office for what?

THE WITNESS: They sell air separation plants and other cryogenic plants in the United States.

Q You have dealt with them on occasion?

A Yes.

Q Is there a company called PPC which is in the business of selling air separation plants as well?

A Yes.

Q They sell in the United States, too?

A Yes.

Q Referring to the gases other than the air separation gases, are any of them sold in bulk liquid form?

A Yes.

Helium is sold in bulk liquid form.

CO2 is sold in bulk liquid form as is hydrogen.

Q Selling in the merchant market, is there an y effective radius in which it is economical to sell gases?

A Yes.

If you are thinking in terms of making an adequate return on your investment, ifyou want to make an adequate return onthat particular account, if you move the product more than 250 miles, the prices current in themarket-place will not give you that return.

Q You are referring now only to air gases, I take it?

A Oxygen and nitrogen.

Q On other industrial gases, perhaps a greater range of distribution is possible?

A The range on argon would be somewhat longer. It is a higher value gas and it doesn't -- it is not peIntiful in all locations of the United States.

The range of CO2 would be shorter.

The range on helium, we ship it all over the world and into some mar-ets in the world where it is not found and that can justify a high distribution expenses.

Q During your ten-year experience with Airco, have you negotiated any tonnage deals?

A Yes.

Q A number of them?

A Yes.

Q With steel companies?

A Yes.

Q Any other companies?

A Chemical companies.

Q Tupically, sir, do those deals have a tyupical term?

A Yes.

They are mostly 15 years for large tonnage plants and in smaller nitrogen plants that we classify as tonnage, they would range from 5 to 15 years, typically 10.

Q Is thereany regular pattern of behavior on the part of companies seeking tonnage supply deals in terms of whet her they seek bids or deal with one possible supplier?

A They almost always seek bids although I have seen at least one occasion where we sold a tonnage supply to a steel company where it was arranged rather than on a bid basis.

In other companies they will seek bids from manufacturers of air separation plants for turnkey plants to be opened by them, by the steel or chemical company.

It is done that way also.

Q What do they do then, compare the results?

A They will try to compare the cost of purchasing a plant and operating it themselves as against the cost of buying product from a plant constructed by the industrial gas supplier.

Q In your experience, does this bidding process have any impact on the resultant price?

A Yes.

To the extent that the steel company, for example, can get a quote from a manufacturer of air separation plants and therefore he has a very good view of your capital costs, it tends to act as a depressant on the price.

Q Move the price toward capital price, you mean?

A Closer to capital costs than most other businesses.

Q You mentioned one situation where a company negotiated a deal with you rather than putting up for bids.

Was that a situationwhereyou had prior experience with that company?

A Yes. We already had a plant at that location.

Q And they wanted an additional plant?

A Right.

Q And wanted you to build it?

A Right.

16

A Have you ever negotiated a deal like that where you hadn't had prior experience with the company?

A No.

Q Now, does the term "back-up" have significance to you?

A Yes.

Q It is used in the industrial gases business?

A Yes.

Back-up specifically refers to the back-up required in a tonnage arrangement.

Now, the reason for back-up is, when you put a plant in for a tonnage scheme where, let's say, you are selling 500 tons a day of oxygen to a steel company, that plant will not operate 365 days a year.

It requires scheduled down time for maintenance that could run ten days and unfortunately there are a number of occasionswhen it goes down not on schedule, by accident.

Those occasions can run from a few hours up to eight to ten days when it is a major problem.

During the times that plant is down either for a scheduled turn around or an unscheduled accident, the steel company will generally want product brought into that location so it can keep running its furnaces.

The typical arrangements is for liquid product

to be brought in by truck or by rail and vaporized down the line for the steel company's use.

Typically, that product is sold at close to the merchant prices, it is not provided to the steel customer at the gas price of the tonnage arrangement, the tonnage agrangement price is much lower than the merchant product is sold.

In order to provide back-up, you must have plant or plants within reasonable proximity to the plant that is down.

Moreover, you also have to have transportation equipment. Because, those quantities of product are huge, when compared to quantities of product sold in the merchant market.

You need rail and truck equipment pretty handy. It is not the rail or truck equipment that you can get on short notice. You really have to have the equipment in your system.

If it is not in your system, it is highly unlikely that you will get it.

JUDGE BARNES: Let me ask you this:

The steel company bears the additional cost, I take it. The y expect some breakdowns?

THEWITNESS: Yes, but there are a number of cases where the steel company has negotiated back-up

18]

at a very unfaborable term to the industrial gas supplier.

That is generally the result of negotriations at the time the tonnage contract is signed.

Now, any back-up that is brought in over and above that contract is almost always brought in at the current market price, the merchant price.

JUDGE BARNES: Figuring that so many tons of back-up will be paid for by the steel company?

THE WITNESS: Generally, yes.

Another way it is done, if the tonnage arrangement has a merchant add-on plant and therefore there is a storage tank at the location, the industrial gas supplier will often commit that a certain number of tons in that tank are always available for back-up.

Q And available for back-up at the merchant price or at the tonnage price?

A That is subject to negotiations.

Q Typically, when you negotiate a tonnage supply scheme, do you also negotiate a back-up arrangement?

A Yes.

Q Therehas been testimony here by Mr. Smith that BOC Airco joint venture sold U.S. Steel a couple of air separation plants.

Were you involved in that?

A Yes.

19

Q Did those negotiations involve any back-up commitment?

A Yes.

Actually, those plants were sold to Airco by a joint venture company.

Q The joint venture company sold the plantsto Airco?

A Yes.

Q And Airco --

A Airco sold the plants to the steel company and this arrangement was done at the request of the steel company because they wanted the guarantees running from Airco to the steel company.

The back-up arrangement was negotiated for these two plants in spite of the fact that they were outright sales plants.

Q What was the tenure of the back-up of the arrangement?

A These are 20-year arrangements.

Q Are there any exchange agreements calling for exchange of products among companies in the industrial gases business?

A Yes.

We have agreements with the various competitors whereby we will exchange product when available in certain locations but none of those arrangements are specified -- specificallytied to a tonnage scheme.

Q Are any of them tied to providing back-up, to one company's providing back-up to another company's tonnage scheme?

A I have never heard of anything like that.

Q They are used really for geographical extension, are they not?

A Yes, and they are all very short term. There would be no way to know whether it would last six months, oneyear or two years.

So that is another reason why it is inappropriate for back-up of a five-year contract.

Q Now, before the joint venture or before Airco sold to U. S. Steel, the two plants which it had purchased from the joint venture, had Airco had any dealings with U. S. Steel?

A Yes.

Q You had supplied plants to steel?

A For many years.

Q Were you -- where you are putting up an air separation column, Mr. Giordano, do you have to decide at that point the proportion of oxygen and nitrogen that you wanted to produce or are those proportions adjustable during the life of theplant?

A They are adjustable within limits.

You have to decide at that point whether you want

a hydrogen recovery plant because that goes to the type of plant you will design and fabricate.

A hydrogen recovery plant, you cannot use the nitrogen as part of the clean-up process through the exchanges.

You can generally, in a conventional plant, get up to 50 per cent nitrogen and 50 per cent oxygen.

If you want higher than 50, up to 75 or 80 per cent nitrogen, you must go to a different design plant.

Q There has been testimony here, perhaps while you were here, that there are areas in the United States today of shortage of industrial gases.

You are familiar with that testimony?

A Yes.

Q Is it accurate?

A It is accurate for a few areas where there are shortages.

But we are talking here of shortages that can range one to two per cent and those shortages may actually erode in a month or two when more product is coming out of these plants and then get short again.

Q Is Airco putting up any new plants currently?

A Yes, we have a plant that will soon start construction -- it has started construction in Selkirk, New York, that is near Albany.

Q Will that be all merchant or a tonnage supply scheme plant?

A It has a very small pipeline customer but we would classify it as an all merchant plant.

Q What area will you be supplying from that plant?

A We will go, certainly west, almost to Boston --

Q I think that is east.

A East almost to Boston.

It has quite a range if you go the other way.

Q Right.

A And probably that same distance north and south.

Q Selkirk is right around Albany?

A Within 30 or 40 miles of Albany.

Q Let me ask you this, sir:

You are beginning construction on that plant?

A That is right, sir.

Q Do you already have in hand, customers whom you will supply from that plant?

A Yes.

Q To what degree of its capacity, can you tell us roughly?

A I can't guess immediately th- capacity but we have for some time been supplying customers in that area from our Bethlehem, Pa. plant and from our Akron plant, which is adjacent to Boston.

Q In effect what you are doing is putting this plant in the middle between two existing plants, is that right, sir?

A That is right.

You said you are. I market pretty much throughout the United States.

Q Are there any areas of the U. S. that you don't market in?

A We don't market much or any product in Florida, northwest of Chicago in Montana, we don't market up there.

That is all I can think of.

Q Do you market in Texas?

A Yes.

Q Do you have any tonnage supply schemes in Texas?

A No.

Q Now, is advertising any factor in the sale of your industrial gases?

A Not in my opinion.

Q You don't advertise?

A We do some advertising but I don't believe it is a significant factor in the marketing of products.

Q What are the cost elements in an air separation unit?

A Well, the largest single cost would be power, whihc would account for 35 to 40 per cent of the manfuacturing

cost.

The second largest element would be depreciation, the depreciation of the cost of the quipment which you installed which could also be 30 to 35 per cent.

The balance of the manufacturing cost would be taxes, insurance and labor.

Labor is a small factor. That would be the cost of manufacture at the spigot, at theplant.

Q Right.

A In most cases you will double that cost, that is, from the spigot on the plant to the customer before you have the laydown of the product.

So, in most cases we are averaging distribution expense that is equal to our production cost.

Q That is not true in tonnage, of course?

ANo, that is in the merchant market.

Q Now, let me ask you about, let's say, pick one of your steel company tonnage supply schemes.

A I have one. Let's take Bethlehem, Pennsylvania.

Q You supply gaseous oxygen to a steel plant there?

A Yes.

Q What is the capacity of theplant?

A We have two 600-ton columns, 800 tons of oxygen per day.

That is, two air separation columns capable of

600 tons each of oxygen.

Q How large a crew runs those two columns?

A In addition to the columns wehave a very large liquifier, almost a 500-ton per day liquifier.

I would say all shifts -- put it another way: On a single shift, it is probably run by 25 or 30 people.

Q That is including the distribution of capacity?

A That would be the people running the truck deposit as well.

Not the drivers, just the dispatchers.

Q Just so far as operation of the plant is concerned, monitoring its functions --

A 20 to 25 people and I would say theplant is worth 17 or $18 million.

Q You have been active in Airco for about ten years now?

A Yes.

Q Could you trace for his Honor the price history and the construction history of the industrial gases business during those ten years?

A Well, during the early sixties, the industry was characterized as -- by a great rash of building up capacity, for two reasons:

One, the industry was perceived by the industrial gas companies as a fast-growing industry.

So, people were rushing to put in capacity to take advantage of the growth.

Moreover, this was the period in which the BOF process, that is, the BOF furnace for steel making had its fastest growth.

The construction of all these massive air separation plants for steel making encouraged the industrial gas companies to add on merchant capacity.

Since the economical unit of an add-on tends to be pretty significant insize, something like 200 tons and up, large increments were added to these tonnage columns for the steel business.

The impact of the over-supply, boht from the perception of the growth rate and the add-ons, severely depressed the prices and there was a downward price trend certainly from '63 or '64 all the way to probably '68, when it hit the bottom.

Starting around '69, we got -- we began to see some pick-up of the demand for industrial gases in the merchant market.

This pick-up began to so p up some of this capacity and prices began to firm.

It has moved upward, I would say, every year since 1969.

However, costs have as well and I would say

in most of the markets in the United States the supply demand situation is relatively close.

However, there still are some very major markets like Los Angeles where supply greatly exceeds demands.

Q And there are areas also of shortage?

A Modest shortage.

Q Is there -- well, let me put it this way:

Do the prices of the industrial gases have any interrelationship?

A They have an interrelationship -- for example, oxygen and hitrogen have an interrelationship that is based on their production costs.

They cost about the same to liquify and to transport.

So, that is inclined to create a relationship with each other.

Argon comes off the same column however. There is a lot less of it and it tends to be a much higher valued product than the other two.

Q How about hydrogen?

A The price of hydrogen is determined by the supply and demand of hydrogen and what it is worth to the customer.

Q Is that true of carbon dioxide?

A Yes.

Q And the other gases we have been talking about earlier?

A Yes. Helium, hydrogen and carbon dioxide have markets of their own where their price relationships are set independent of each other.

Q Would you describe to us the degree, if any, to which prices in the merchant and tonnage fields respondto supply conditions?

A Well, both the tonnage and merchant market are characterized by very vigorous competition and they both respond very quickly to supply and demand.

Q So that when the supply is abundant or super abundant, what happens to the prices?

A Well, they go down.

For eample, in the tonnage area, the capacity to supply tonnage plants is determined by the amount of work in the fabrication shops around the world that make air separation plants.

During the period that we had our joint venture with BOC there was not too many requirements for air separation plants and these fabrication shops were not very well loaded and there was a great deal of competiton and lower prices for air separation plants, tonnage plants.

And the same is true of the merchant market. When there is lots of liquid oxygen, an excess, prices go down.

JUDGE BARNES: Let's take a five-minute recess.

(Recess taken.)

MR. THURMAN: Your Honor, before Mr. Topkis continues, we believe the witness suggested areas of questios to further examine him on, discussed other parts of the testimony such as price and such during this past break.

I believe that this is not proper.

Mr. Giordano should be required to state what areas he suggested and Mr. Topkis be forbidden from going into those area.

JUDGE BARNES: Well, I think it is a little unusual to discuss this matter, Mr. Giordano and it shouldn't be done.

Once you become a witness, you should refrain from discussing the testimony with counsel.

I don't know which areas were discussed but I don't think I am going to prohibit him from going into them.

MR. TOPKIS: I will tell your Honor, I have my notes right here.

Mr. Giordano said to me as we were leaving, he

said you didn't ask me about the comparative prices in the different markets and you didn't ask about the distributors.

If you don't want me to ask him about those, I won't.

JUDGE BARNES: You may.

Do you have a force that calls on customers with respect to the selling of gases and welding equipment?

THE WITNESS: Right.

Q If you would, would you tell us about the distributors who are these distribu-ors to whom you sell?

A To set the other two oi., we talked to the tonnage and we talked about the bulk merchant that gets put in the tank car and vaporized.

The small user market, people that use it in these little cylinders that you have referred to, about four feet tall, they too use it as a gas and the way the product reaches that customer is, it goes from the plant in a big truck to a tank at the distributor's location, the size of the tank is similar to thesize of the customer tank of the bulk customer.

However, it also has a pump on it that enables that liquid product to be pumped to a long rack to which are attached cylinders and it is pumped at high pressure into these cylinders and in effect of a filling station and those cylinders are put on a truck and

delivered to the distributor who has bought the product from us to the customers.

JUDGE BARNES: Does the distributor own the cylinders?

THE WITNESS: Yes, he can, although we often rent them to the distributors.

This distributor is basically a welding supply distributor.

He will be selling all of the other gases and welding equipment connected with the process.

Q Will he be selling CO2?

A Yes.

Generally CO2 for welding in cylinders.

Q Not CO2 for use in beverages or other uses?

A No, unless he has a franchise for CO2 in beverages.

There are many distributors of CO2 but the overlap is small.

Q Now, the other matter, the -- could you compare for the record the price at which a cubic foot or whatever appropriate unit you can talk about is sold on a tonnage scheme as bulk and in cylinder?

A Yes.

We, in the industry, sell our product by hundreds of cubic feet.

The unit is a hundred cubic feet. It is

in larger quantities also in terms of tons.

In the cubid foot measure, the count would be tonnage account, 3cents a hundred cubic feet.

A merchant account who receives it in a liquid tank, it would be anywhere from 16 to 30 cents per hundred cubic feet.

These prices are oxygen, nitrogen, not argon, CO2.

That same product, oxygen or nitrogen in one of those four-foot cylinders would range anywhere from a dollar twenty-five to two dollars, depending upon how far the truck had to go to deliver it.

Q Now, coming back for a moment to the matter of the make-up of your costs which, in a tonnage scheme you spoke of as power, plant depreciation and labor, does the quality or characteristics of those costs have any impact on your operation?

A Well, those two costs, the depreciation and the power are essentially fixed costs in the sense that the depreciation is related to some capital and the power, if you are going to run for any length of period, because of the high demand charge is really a fixed cost as well.

Q What do you mean by a high demand charge?

A Your demand charge is determined by the peak in the period and the contract you have made with thepower company.

Q It is a fixed charge the power company imposed?

A It operates as a fixed charge.

Your power bill is made up of a demand charge and a variable charge.

You pay that demand whether you use thepower or not.

In many cases it is a relatively high portion of the total power bill.

If you are paying ten mils, you can often have a four to five million demand bill.

You pay that whether you use the power on that given day or not.

Q The major elements of your costs are fixed.

A Yes.

Q Now, does that have any significants in terms of yourprice responsiveness?

A Well, what it tends to do to the merchant gas business, is to encourage you to load theplant.

If you don't load the plant, you are stuck with very high fixed costs and this has been one ofthe elements that has caused price cutting and severe price competition when there is over-supply.

Q Now, we have heard a little bit on occasion about the joint venture between BOC and Airco.

You were involved in that, of course?

A Yes.

Q Did you originate it?

A I can't recall whether I originated it. I was responsible for the industrial gas business as a group vice president during the time it was originated.

Q And were you the one who made the decision so far as Airco was concerned, to terminate it?

A Yes.

Mr. Dillon and I, together, had a great deal of consultation and decided to terminate it.

Q Why was that?

Why did you reach that decision?

A The reasons for forming the joint venture simply had not come to pass.

First of all, we had thought at the time we formed the joint venture that there was a great deal more demand in the world and in the United States for air separation plants than materialized during the period of the venture.

The impact of that was that the plant at Edmonton near London was hardly loaded at all.

Secondly, before forming the venture, we had for some time been looking for a tie-up with a company that would give us the capability to manufacture air separation plants.

We had thought at that timethat that was a very important element in our industrial gas capability.

During the period of the joint venture, I think we had occasion to reassess that and concluded that it was not as important as we had thought.

Q So for those reasons you decided to terminate it?

A Yes.

Q Let me ask you to go back intime to this past November and tell us, please, in your judgment, what foreign companies, if you are familiar with them, had the expertise and the finances, expertise in both technology and marketing, to enter the U.S. gases industry?

A From my knowledge of thé foreign companies that I am familiar with, I would say that that group would include L'Air Liquide from France, Messer from Germany, Linde AG from Germany and possibly AGA from Sweden.

Q How about the Japanese?

A The Japanese companies that I am familiar with, one that I am familiar with certainly has the technology to enter the market but the differnces in culture are so substantial that I think it would be difficult for them to come in.

Q Now, as of last November -- you mentioned L'Air liquide, they were already in the U.S. market as a subsidiary?

A Right.

Q As of last November, would you have recommended to any of these companies that they enter the U.S. gases business on either a Greenfield or a toehold basis?

MR. THURMAN: Objection.

Is this a hypothetical question?

JUDGE BARNES: I think it is.

I don't know the point of it, Mr. Topkis, really.

He is in the market. I don't think he would recommend that any competitor come in the market. If I were, he I would not.

Q Let's put it this way:

As of last November, did you anticipate that any of the companies that you have mentioned would enter the U.S. market on either a Greenfield basis or by making a toehold acquisition?

A No.

I didn't anticipate that.

Q Would you explain?

MR. THURMAN: I object to the form of the question.

I don't know what there is to explain.

JUDGE BARNES: He said a number of companies had the technology and so forth and now he is saying that

he did not expect them to enter.

A Well, the industrial gas business in the United States is characterized by a few things.

Number one, it is not a particularly high return business.

That is, the return on the total capital employed is low by American standards.

Number two, it is an industry characterized by very aggressive competition.

Number three, the economies of production and distribution do not permit inroads to be made in the market, for example, by imports.

As a matter of fact, you can't even move product very practically from one region of the country to another.

These three characteristics would suggest to me that a company that did come in, one of the companies that I made reference to, would have to invest money to try to break into the market, no doubt take a long time to load a plant and as a consequence, that investment would not pay out for a very long period of time.

This is really very different than most of the developing markets of the world, for example, where the growth rates are high and the competition is not as keen and the return may be higher initially.

MR. THURMAN: Your Honor, we move that a portion of the testimony be stricken where he is talking about the industry -- is he talking about the return -- if he is talking about the return of Airco, we have no objection to that.

If he is talking about the return of the industrial gases companies being a low return, we would object to that and move it be stricken.

JUDGE BARNES: Unless there is a foundation?

THE WITNESS: Yes.

Q You are familiar with your own rate of return?

A Yes.

Q Do you make it your business to try and formulate edicated judgment as to the rate of return, experience of your competitors?

A Yes, in a great many different ways.

We try to estimate their return by what we can gleen from their facilities, our own knowledge of what it costs to distribute the product.

In terms of company that publish data, Big Three or Air Products, we use the data published and try to make an educated guess.

MR. THURMAN: Perhaps we ught to remove the in camera treatment of those documents if this is known throughout the industry.

JUDGE BARNES: Is that a motion or just a comment?

MR. THURMAN: I think it would be easier to write a decision --

JUDGE BARNES: You have to worry about your findings before you can write a decision.

Continue with your examination, Mr. Topkis.

Q Mr. Giordano, what you have said applies to a Greenfield entry, the construction of a new plant.

How about a toehold acquisition, such as perhaps, Burdett of Cleveland, or Norristown or Alabama Oxygen?

A Well, to comment on that by -- you would really have to take them one at a time because they are all very different and different consequences as to the acquisition of each one.

In the case of Alabana Oxygen, they do business in a town where we are constructing a thousand-ton plant.

It would be a pretty poor acquisition for a company to come in and buy a little 25-ton plant company right under the shadow of our significantly larger plant.

What was the other one?

Q Burdett of Cleveland or Burdett of Norristown.

A In the case of Burdett of Cleveland, there are some

problems with that company that I believe have made it unattractive to any buyer, foreign or domestic.

They revolve around a contract for a tonnage plant that they have in Joliet, Illinois that is such an enormous contract that people looking at the plant have walked away because of the enormous terms of this contract.

JUDGE BARNES: Why is that your knowledge?

THE WITNESS: This is a tonnage contract where they supply oxygen to, I believe, a subsidiary of Northern Natural Gas and as a result of their negotiations with Northern Natural Gas, they took on some of these back-up responsibilities that I described earlier except it is their responsibility to back-up.

I think I described earlier that when we back-up a steel plant, we back it up with merchant product at merchant prices.

These fellows are obligated to back up that plant at their own cost and this is just one of a fair number of onerous terms.

JUDGE BARNES: How do you know all of this?

THE WITNESS: We offered to buy that plant from Burdett of Cleveland.

JUDGE BARNES: When was this?

41

THE WITNESS: This probably was an ongoing negotiation that goes back two and a half years and probably terminated maybe nine months ago.

In the course of evaluating whether we wanted to buy theplant, we examined the contract with care.

JUDGE BARNES: All right.

Q Is there any other company engaged in the industrial gases business that you would regard as an appropriate toehold or entry for acquisition by a foreign company?

MR. THURMAN: Objection.

An improper foundation has been laid.

How he knows and if he knows --

MR. TOPKIS: If he answers tat there is such a company, I will, of course, ask him how he knows.

JUDGE BARNES: Is there any such company?

THE WITNESS: You will have to define toehold a little better.

Q I will take a big toe or a little toe, any kind, any company engaged in any aspect of the industrial gases business that you would regard as an appropriate means of entry for a foreign company wanting to establish itself into the American industrial gases industry.

JUDGE BARNES: I assume Airco was one you recommended.

THE WITNESS: I was going to say that.

MR. THURMAN: I think we will have to object

42] to this question again.

He is talking about what foreign companies would come in and he is involved with a foreign company itself.

I assume he doesn't want any foreign company to come in and take a smaller competitor and build it up to become a formidable competitor with them.

JUDGE BARNES: The question is, does he know of any companies.

MR. THURMAN: That could be purchased and expanded.

THE WITNESS: No, not in this sense.

There would be no point in my opinion for a foreign company to come in and buy a small industrial gas company that is in one little regional market and add a 25 to 50-ton per day plant.

That is a de novo entry into the market.

There is little difference between the cost of entry -- if you mean a national company, by toehold, by Airco or an equivalent, that is a different situation.

Q Well, now, the French, L'Air Liquide, sometime AGA acquired American Cryogenics, are you familiar with that?

A Some of the conditions of it, yes.

Q You do know that they made the acquisition?

43

A Yes.

Q Is there any company on the scene today comparable to American Cryogenics as a possible vehicle of entry?

A No.

The only compan y of a comparable size somewhat larger than that would be Big Three. Big Three would probably make a fine acquisition.

Q Big Three is the dominant company in the gulf area?

A In Texas, yes.

Q If anybody wanted to acquire them they may have trouble with Mr. Thurman and his colleagues.

That is the only one that you know of?

A Yes.

Q Now, I will ask you, sir, did you ever hear of -- well, never mind.

Did you ever make a pricing decision, a manufacturing decision or a marketing decision or a decision about research and development which was influenced at all by the possibility that British Oxygen might enter the gases business in the United States?

A No.

Q As of November -- well, I can't ask you as of November, 1973, but let's go back to this time in the spring of 1973, at that time did you anticipate that British Oxygen would enter the U.S. industrial gases business?

44

A No.

Q With reference to back-up, sir, could you compare the problems, if any, which BOC and U.S. Steel might face, were each of them to decide to enter the American industrial gases business?

MR. THURMAN: I object first to the form of the question.

I don't know what he means. I assume he is still not talking about Airco. He is talking aboutwhat other people would be doing.

I assume hs is still not talking about Airco. He is talking about what other people wouldbe doing.

I would like basis for it, for his foundation. He hasn't entered this market.

I don't know that he knows what the foundation question would be.

There would be high barriers, we will stipulate to that.

JUDGE BARNES: I think he has addressed a specific problem of back-up.

MR. TOPKIS: That is right, your Honor.

JUDGE BARNES: And what back-up problems he anticipates BOC would have if they have a contract with U. S. Steel.

MR. TOPKIS: No, I'm sorry, your Honor.

Perhaps I haven't made myself clear.

May I try again?

JUDGE BARNES: Yes.

BY MR. TOPKIS:

Q Are you familiar with a number of air separation plants that U. S. Steel owns?

A Yes.

Q Could you compare for us the problems, if any, which U. S. Steel on the one hand and BOC on the other hand might have in terms of back-up of each of them separately decided to enter the American industrial gases business?

MR. THURMAN: Objection to the form of the question.

I still don't understand the question.

JUDGE BARNES: I think I understand it now.

MR. THURMAN: Good. Maybe I will learn after the answer.

JUDGE BARNES: You may move to strike the answer if you still don't understand it.

Continue.

A If U. S. Steel decided to enter the industrial gases business by supplying plants, they would have to provide back-up for those plants.

However, they are such large buyers in the United States in these major markets, of oxygen, and they

are already producing oxygen at a number of their plants, they would have a much easier time and when I say easier, easier than BOC, not easier in absolute terms, but easier than BOC in obtaining back-up, than say BOC trying to enter the market de novo without acquisition.

Q Would the same be true of other steel and chemical companies which own their own air separation plants?

A It would be less true of a very small steel company.

Q I see.

But to the degree that these companies already owned air separation plants, would that effect the degree of how they would have a back-up problem?

A Yes, and also to the degree that they were large buyers of oxygen themselves.

Q Why would that be, sir?

A Well, they exercise a considerable influence on the sellers of industrial gases by virtue of what they buy.

MR. THURMAN: Objection.

I still don't understand the question and I move to strike.

If he is saying -- is he saying that U. S. Steel can sell Bethlehem Steel and knock out a U. S. industrial gas company from selling?

JUDGE BARNES: That is not what he is saying. Didcuss it with Mr. Youngwood at night what he

is saying.

MR. THURMAN: I don't know that Mr. Youngwood understands it.

MR. YOUNGWOOD: I don't.

Q Mr. Giordano, you talked a few moments ago about shortages that exist around various portions of the countries.

Are those shortages confined to the atmospheric gases or do they go to other gases also?

A There are no shortages of helium.

Hydrogen would be short in certain areas of the country only because it is hauled great distances and not made there.

There are only one or two spots in the country where there are CO2 shortages because plants are down at this time.

The other shortages which I was referring to were oxygen, nitrogen and argon.

Q Can yuo forecast how long those shortages may continue?

MR. THURMAN: A crystal ball?

JUDGE BARNES: He is president of one of the larger companies and he must have some idea of what he anticipates.

A I would say that with the new capacity that has been

announced or that is under construction, most of these shortages will be alleviated fairly soon.

For example, there is a shortage in the northeast right now, of pfoduct.

We have a plant under construction right now and there are some expansions of some other plants other than construction.

One of our competitors has announced a new plant in the same area.

So, in the 18 to 24 months that it takes for these plants to come on, the shortage will be alleviated. There will be an excess.

O It has been stipulated here and I think the stipulation is in ev idence, I don't have the number offhand, but perhaps somebody can tell me, that the deliveries of Airco in 1972 as reported to the census of -- I'm sorry, I think that was Union Carbide -- I will start again.

Sir, it has been stipulated thatin 1972 for the year 1972 Airco reported to the census a certain figure for its deliveries or shipments fob plant of industrial gases including CO2.

I am not going to give you that figure but I am going to ask you, does that figure as I have just described it, have any significance for you?

MR. THURMAN: Objection unless he knows what the figure is.

JUDGE BARNES: I am going to show the witness Exhibit 325A.

Is that the one?

MR. TOPKIS: I think so, your Honor, yes.

JUDGE BARNES: I will show you the description of what was reported.

MR. THURMAN: I hope you are not showing him their figure.

He is not supposed to see anything but his.

JUDGE BARNES: He was very interested in it.

THE WITNESS: I'm sorry, the question will have to come back to me.

JUDGE BARNES: I can still show youyour figure.

Q Now, sir, does the figure thus described have any significance for you?

MR. THURMAN: Objection.

JUDGE BARNES: I hope it has the significance that it was reported to the bureau of census.

MR. TOPKIS: Of course.

JUDGE BARNES: Ask him another question.

Q Does it have any meaning to you, is it a meaningful figure?

MR. THURMAN: Objection to the form of the

question.

We'll want voir dire to find out what he knows about what is reported to census.

JUDGE BARNES: Do you know how this figure was arrived at?

THE WITNESS: I don't know how we report to the census. I am not familiar with that.

Q Doyou know, sir, the value, fob plant of your shipments?

MR. THURMAN: Objection unless he knows what the definition of the census is, knows something about the census.

MR. TOPKIS: I am not putting that question to the witness.

I am asking him, does he know the valua fob plant --

THE WITNESS: If by that you know the value of our product eliminating distribution or freight expenses, it is not a number generated normally that is seen in the course of looking at operating reports.

So that would not be a number that is familiar to me.

Q How do you price your gases, sir, fob plant or delivered?

A Delivered.

Q Is thereany way to tell how much to deduct to arrive at an fobplant approximation?

MR. THURMAN: Objection, your Honor.

On this line of questioning, since -- unless he is familiar with census, he can't really answer an y questions concerning this.

We have to have a definition. He is talking about the overall products.

Is he talking about common ground and manufactured products only?

It is apples and oranges is what he is trying to get to and this witness, in all due respect, is not familiar with what we are talking about.

JUDGE BARNES: I think he has indicated that he has a limited knowledge.

He did not prepare it and thecompany did not normally generate this figure.

Q Is that right, sir?

A What I said was that the way we manage the business, the numbers we put together for operating the business, we do not generate numbers that way, fobplant.

Q These are not numbers that you rely on in your business?

A No.

Q Would it be necessary to take the numbers that you do

generate in your business and apply certain judgments to them to arrive at an fob figure?

MR. THURMAN: Objection.

JUDGE BARNES: can you answer that question?

THE WITNESS: Well, I am familiar with the numbers in the business so I can answer the question, yes.

Assuming that the numbers are submitted as the value of our shipments at the plant, deducting any freight or distribution expenses, yes, we could generate that number.

We would have to make certain adjustments to the numbers that we normally generate.

Q And those adjustments would require the expertise of accounting judgment?

A Yes, they always do.

Q At a very minimum?

A Yes.

Q In your business, sir, what figures for shipments do you use and rely on?

A Well, we use a variety of different kinds of figures.

The figures for the annual report that refer to our industrial gas sales are the value of our shipments, the revenue received from the customer which includes

freight, profit, overhead, production costs.

MR. THURMAN: I would like to know what annual report he is talking about, what figure in the industrial report.

THE WITNESS: I will point it out to you if you like.

This figure, one of the constituents would be industrial gas.

That would be the full sales to the customer which includes distribution, production cost, overhead, et cetera.

JUDGE BARNES: The witness has referred to an annual report, sales and earnings by line of business and the category, industrial gases, cryogenic cutting equipment.

MR. TOPKIS: Thank you very much, Mr. Giordano.

No further questions.

JUDGE BARNES: We will adjourn until 9:30 tomorrow morning and commence with cross-examination.

MR. WOLLEN: Just so we understand, I have a few questions on direct examination which I will do tomorrow morning.

JUDGE BARNES: Fine.

Should we meet at 9:30 or 10:00?

54

MR. TOPKIS: Whatever your Honor wishes. 9:30 is fine with us.

MR. THURMAN: Yes.

JUDGE BARNES: All right, 9:30 tomorrow morning then.

(Whereupon, at 5:45 p.m. the hearing was adjourned to June 7, 1974, at 9:30 a.m.)

CONTENTS

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Vincent Giordano, resumed	1972	1978	2018	2027
Ray Dow	2035	2048	2056	2057
Albert W. Karnath	2063	2083		

EXHIBITS

	FOR IDENT.	IN EVID. (In Camera)
AR 83A-U		1974
BOC 235	2069	2069
BOC 58A-58Z81		2077

BEFORE THE FEDERAL TRADE COMMISSION

----------x

In the Matter of:

BRITISH OXYGEN COMPANY, LTD., BOC FINANCIAL CORPORATION, BOC HOLDINGS, LTD., BRITISH OXYGEN INVESTMENTS, LTD., AIRCO, INC.

Docket No. 8955

----------x

Hearing Room D
26 Federal Plaza
New York, New York
Friday, June 7, 1974

Met, pursuant to notice, at 9:30 a.m.

BEFORE: EARNEST G. BARNES,
Administrative Law Judge

APPEARANCES:

K. KEITH THURMAN, GORDON YOUNGWOOD, DON FURCELL, DARYL NICKEL, RHETT KRULIA and HOBN HOAGLAND, on behalf of the Federal Trade Commission

JAY H. TOPKIS, LEWIS A. KAHLAN and MOSES SILVERMAN, Paul, Weiss, Rifkind, Wharton and Garrison 345 Park Avenue, New York, New York, 10022, on behalf of respondent, British Oxygen Company, Ltd.

FOSTER WOLLEN, R. BRUDE MAC WHORTER and DAMFORTH NEWCOMB, Shearman and Sterling, 53 Wall Street, New York, New York, 10005, on behalf of respondent AIRCO, INC.

ROBERT L. DOAN, Assistant General Counsel, Union Carbide Corporation, 270 Park Avenue, New York, New York, and ALEXANDER W. SIEROK, Wald, Harkrader and Ross, 1829 19th Street, N.W., Washington, D.C., 20938, on behalf of Union Carbide Corporation

- - -

JUDGE BARNES: On the record.

MR.WOLLEN: Your Honor, as I said yesterday, I have two questions of Mr. Giordano limited to the Section 5 claims against Airco.

DIRECT EXAMINATION

BY MR. WOLLEN:

Q I hand you what has been received in evidence as Complainant Counsel Exhibit 99-C and 99-D and ask you if you would please look at that document and tell me whether your signature appears on Exhibit 99-D.

A Yes.

Q In fact, isn't that document on your letterhead?

A Yes.

Q Would you please describe for the record the events leading up to the execution of this document?

A Yes. I had had a meeting in London with Mr. Smith, chairman of BOC, on June 30, June 30, 1973, where we had discussed a closer association between the companies. We had also decided that in order to evalute whether a closer association was desirable, we should meet with a working party of executives of the company and we would have to exchange some information about each of the company's operations.

This letter was drafted by Airco to cover the exhhange of that information,that is, its confidentiality after it

was exchanged, and we also felt that this information, this confidential information could be used by someone in an unfriendly way. It was the kind of information, for example, that would help another company evaluate whether or not they would want to make a tender offer for Airco shares.

Accordingly, we included one of the porvisions in this agreement which relates to not tendering for Airco shares without the approval of the Airco board of directors, for some period of time after the information was exchanged.

Q Did you attend meetings in July in New York between representatives of BOC and Airco?

A Yes.

Q Are you familiar with what information was in fact excahnged between BOC and Airco?

A Yes.

Q Mr. Giordano, I hand you what has been marked for identification as Respondent Airco's Exhibits 83-A through 83-U and ask you if you can identify that document for me.

MR. WOLLEN: For the record, that document is one of the Airco exhibits which were identified in our list of exhibits and delivered to complainant counsel some six weeks ago.

Q I think I asked you, can you identify the document for me?

A Yes, this is a series of slides prepared by Airo

personnel which were used by me in making a presentation at that meeting to the BOC executives. The subject of the presentation was a description of our major businesses. In addition, we handed this material to the BOC executives at the meeting in July.

MR. WOLLEN: Your Honor, I offer Airco Exhibit 83-A through U in evidence. I also would request that it be received in camera, your Honor.

Let me say for the record, your Honor, I am obviously not offering this document for the truth that is contained in it, but only for the fact thatthe information was, as Mr. Giordano testified, delivered to BOC in 1973.

MR. THURMAN: We have no objection.

JUDGE BARNES: I will receive AR Exhibit 83-A through 83-U in camera.

(Exhibits AR 83-A through 83-U received in evidence in camera.)

Q May I direct your attention specifically to Respondent Airco's Exhibit 83-D through U, and ask you if you can describe for therecord how the figures appearing in the column, "Sales, 1978," were arrived at?

MR. THURMAN: Objection, your Honor. In the first place, if it is not in for the truth of the matter, it doesn't matter how the sales were arrived at, and a proper foundation should be laid.

JUDGE BARNES: I think he is going to tell us how they were arrived at and that should be a foundation as well as an answer. It would still be helpful to know how the figures got here, they were arrived at.

MR. THURMAN: Even though they are of no use?

JUDGE BARNES: Yes, I would like to know.

A I instructed the Airco personnel to prepare these figures in the manner in which these figures were to be prepared. The sales for 1978 are not in fact a forecast of the sales of these businesses. They are just an extrapolation of the current sales rate, the current market share and the estimates of growth. So, they are purely arithmetical. In other words, if the sales in this particular business were $50-million, and our current market share was 15 percent and our estimated growth rate was 3 percent, it was merely an arithmetical calculation of that extrapolated for 1978, and all the pages, O through U, are calculated in the same way.

Q When you say "estimated growth rate," are you referring to Airco's growth rate?

A No. Total market growth rate.

JUDGE BARNES: Is the market share the current market share?

THE WITNESS: Yes.

Q Now, Mr. Giordano, are you aware of any other information delivered by Airco to BOC after July 25, 1973?

A No.

Q Did Airco deliver any customer list to British Oxygen Company?

A No.

Q Did Airco deliver any trade secrets to BOC?

A No.

Q Any formulas?

A No.

Q Knowhow?

A No.

Q Formulas?

A No.

Q Manufacturing processes?

A No.

Q Any confidential or business information?

A Not to my knowledge.

Q Are you familiar with the information that Airco received from BOC?

A Yes.

Q Can you describe that for us?

A They gave us forecasts, that is, financial summary material, sales, profits, return investment for their major business areas. I believe they were five-year forecasts, five years past 1972, actually.

Q Did BOC give you any other information besides that?

A No.

Q Any customer lists?

A No.

Q Trade secrets?

A No.

Q Manufacturing processes?

A No.

Q Knowhow?

A No.

Q Formulas?

A No.

Q Any confidential or proprietary business information?

A No.

MR. WOLLEN: No further questions, your Honor.

MR. THURMAN: Before we go, your Honor, if there is no confidential information, then there is no reason for these documents being in camera. There was nothing supplied of a confidential nature.

JUDGE BARNES: Other than this exhibit.

MR. WOLLEN: That is exactly what I said, your Honor.

MR. THURMAN: Did you say supplied to Airco --

MR. WOLLEN: Mr. Giordano answered the question as to what was delivered to him by British Oxygen and he mentioned the five-year forecast. My question was, was any other information delivered, and I believe he answered on that

basis.

MR. THURMAN: Your Honor, before we commence cross-examination of this witness, I would like to ask Mr. Topkis for any verbatim or substantially verbatim statements that he might have.

JUDGE BARNES: Mr. Topkis, do you have anything?

MR. TOPKIS: Well, happily, your Honor, I have none, except for the transcript of Mr. Giordano's prior testimony in the investigation of which, I am sure, my friends have a copy.

JUDGE BARNES: Any notes or letters?

MR. TOPKIS: I have lots of notes, no letters.

JUDGE BARNES: We would like to examine them.

MR. TOPKIS: I would refuse to produce them unless ordered by your Honor.

JUDGE BARNES: We will move on if he doesn't have any substantially verbatim statements.

CROSS-EXAMINATION

BY MR. THURMAN:

Q Mr. Giordano, have you attended any hearings in this case?

A Yes, I attended a part of the hearing in Washington for about two hours.

Q Who did you hear in Washington?

A Mr. Mueller.

Q And in New York?

A I havebeen here since the opening of the session on Wednesday.

Q And you heard the chairman of the board of BOC, Mr. Leslie Smith?

A Right.

Q And as far as transcripts in this case, have you seen any transcripts of testimony?

A Yes. I have skimmed the transcript involving the testimony of Mr. Flamm and part of Mr. Baker's. I have also skimmed some of the transcripts where the various attorneys were presenting their positions on the case.

Q Mr. Flamm is with Linde and Mr. Baker is with Air Products?

A Right.

Q Did you read any of the investigation and transcripts in this case?

A I read my own, I believe I read Mr. Dillon's, I read Mr. Laister's, and I think I read Mr. Smiths, but I don't remember the occasion.

Q Mr. Giordano, does Airco produce MAPP gas?

A No.

Q Does Airco sell MAPP?

A Yes.

Q What pereentage of Airco's total shipments of industtial

gas is accounted for by the sale of MAPP in 1973?

A I have given you an estimate, but I would have to refer to other documents to give you an accurate number. I would guess 4 percent, 3-1/2 to 4 percent.

Q Of the total sales?

A The total gas sales.

Q Industrial gas sales, oxygen, nitrogen and argon?

A That's right.

Q What firms compete with Airco with the sale of MAPP?

A There are no firms that sell MAPP in the United States besides Airco.

Q What firms are competitors of Airco in the market of helium in the United States?

A In the marketing of helium the firms we would compete against would be Gardner Cryogenics, Air Products and Chemicals, Union Carbide, Chemetron markets helium. I am sure Liquid Carbonics markets helium, Big Three markets helium. And there are various other companies that market helium, including some of the producers of helium.

Q The producers market to what type of customers?

A The one producer I am familiar with, the Kansas Refined Helium Company, will market to any customers that will buy from them.

Q Your customers?

A Yes.

Q Do you know of any of your customers or previous customers that bought helium from Kansas?

A I can't name any specifically, but it was brought to my attention that in the past some of our customers decided to buy directly from Kansas Refined Helium Company.

Q Basically your competitors are the other industrial gas people; correct?

A Plus the producers like Gardner Cryogenics and Kansas Refined Helium Company.

Q Mr. Giordano, what percentage of Airco's shipments of industrial gas since 1972 were accounted for by the air separation gases?

MR. TOPKIS: Is this in dollars or feet or --

MR. THURMAN: I don't care which one, volume or dollars. It should be pretty darn close.

JUDGE BARNES: Ask him one or the other or both.

Q Dollars.

A Here I will try to make an estimate, but I will have to refer to other documents to give you an accurate number.

Are you looking for an annual number or the total number for the years you mentioned?

Q A percentage of total annual sales, what percentage was accounted for by the air separation gases?

A Including tonnage?

Q Yes, oxygen, nitrogen and argon.

A All forms?

Q Yes.

JUDGE BARNES: In the year 1972.

A I would guess 50 percent.

Q Is this the percentage of gas that was manufactured, industrial gases -- maybe my question wasn't as clear as I would have liked it. I asked you the question, what percentage of the industrial gases produced and marketed by Airco in 1972 was accounted for by the air separation gases.

A Well, my guess was expressed in terms of oxygen, nitrogen, and argon only, all of which we produce --

Q I don't want what you purchased and resold.

A That would be a small percentage of the number, anyway. It is oxygen, nitrogen and argon produced in a tonnage form and sold to our customers, sold to hospitals in our medical division.

JUDGE BARNES: That was a percentage of dollar sales?

THE WITNESS: Yes.

Q Now, this is what you produced in those gases and compared to what you produce in the other gases in sales. I don't want the total number of the gases that you purchased --

A I couldn't give you that answer because in order to give you that answer accurately, I would have to take the balance of our sales and subtract those gases because --

such as MAPP, and then reconstruct a total gas shipments figure and take the atmospheric gases and develop a number as against the total produced and sold.

Q It would be much higher?

MR. TOPKIS: Higher than what?

A Not much. We don't sell too much in the way of gases that we don't produce. The only two gases would be helium and MAPP.

Q Do you have any other gases that account for more than 10 percent of your sales?

A Other gases?

Q Other than air separation gases, what is your next largest --

A Carbon dioxide.

Q And you produce carbon dioxide?

A Yes. Let me modify my previous answer:

In the carbon dioxide product line, we would purchase and market the lion's share of our carbon dioxide.

Q You purchase the lion's share?

A Yes.

Q What percentage of your industrial sales is accounted for by CO_2?

A About 18 percent, maybe a little less, about 16 percent of our total industrial gas shipments in dollars would be accounted for by CO_2, say in 1973.

Q So we are on the right wavelength, my understanding of the lion's share means practically all; is that what your interpretation is?

A My reference point would be two our of our 14 supply points would be operated and owned by us.

Q Airco doesn't manufacture or sell propane; is that right?

A That is correct.

Q Why not?

A It just appears to us not to be a profitable business that we could be in.

Q What percentage of Airco's total shipments of industrial gases are produced by Airco in 1972, dollar volume as accounted for by shipments of propylene?

A It is so miniscule that I really don't have the number at my fingertip. It is less than one percent or less than a half of one percent.

Q How many tonnage plants does Airco have in the United States?

A May I refer to the annual report; it may help me.

Well, I can count them for you. It doesn't say. We could get to the total by me counting each one.

Q I would like to have some idea.

A Claymont, Delaware -- I am talking about plants and not customers.

Claymont, Delaware; Bethlehem, Pennsylvania; Arroyo,

West Virginia; Warren, Ohio; Buffalo, New York. We have tonnage accounts at St. Louis; we have tonnage accounts at Johnstown, Pennsylvania, and we have maybe 15 or 20 what we call small nitrogen plants which are tonnage accounts and I don't recollect allthe names of those 15 or 20. The annual report states that we have 19 on-site nitrogen gas plants.

Q Now, Mr. Giordano, out of these tonnage plants owned and operated by Airco, how many of these tonnage plants have excess capacity to be sold in the merchant market?

A The tonnage plants manufacture gas. We don't sell that gas in the merchant market. They are two different businesses.

Q The on-site plant, then, the tonnage plant, is only used for that customer? There is no excess for --

A The gas capacity is used only for that customer. In order to take someof that gas and sell it to the merchant market, we have to add on another part of the plant, a liquid plant, and in some cases we don't have liquid plants connected to those plants at all.

JUDGE BARNES: Would all of your merchant gas business be in a liquid form?

THE WITNESS: Yes. Even though it would be used as a gas by the customer, we would make it in liquid form and ship it in liquid form. The reason for that is purely the

economics of distribution.

Q What percentageof Airco's sales in 1972 was accounted for by the tonnage plants?

A Airco's total sales?

Q Industrial.

JUDGE BARNES: In dollars?

Q Gases in dollars.

JUDGE BARNES: In 1972.

A '72 or '73?

Q '72.

A I'm a little less familiar with '72, but if it is approximately the same as '73, it would be about 16 to 18 percent of our total industrial gas shipments in dollars.

Q '72 and '73 were peak performance years for Airco, weren't they?

A In what?

Q In production of industrial gases.

A I don't know. I would have to check the previous years to give you the answer. I don't know the answer to that.

Q What firms compete with Airco for the sale of hydrogen in the United States?

A Linde Division of Union Carbine, Air Products and Chemicals, and I believe hydrogen is marked by Chemetron, Big Three, and many of the other industrial gas companies.

Q What firms compete with Airco for the sale of CO_2?

A Liquid Carbonic Company, Chemetron Company, and a number of other companies that also produce and sell CO_2.

Q I believe you referred to a firm or a company yesterday in your testimony as PPC?

A That's right.

Q Who is PPC?

A PPC is a company that certainly for the last eight years that I have been familiar with them, manufacture and sell air separation plants in the United States.

Q Where are they located?

A I believe in Long Island.

Q Is this theonly product it sells? PPC?

A I don't know what the balance of their product line is.

Q Do you know what "PPC" stands for?

A Process Plants Corporation.

Q How many turnkey plants has Airco sold since 1967?

A Since 1967?

Q Yes.

A The only plant that I know of are the two air separation columns at Fairlies, Pennsylvania, which we sold to U.S. Steel.

Q Do these turnkey plants sell on the open market?

A I don't understand what you mean by the open market.

Q Does the turnkey plant only supply its owner or does it go out and sell your customers in the industrial gas field?

A I don't understand the question.

Q You made two turnkey plants for U.S. Steel. Did U.S. Steel compete in the market for Airco?

A No, these are tunnage plants. They don't make any liquid at all.

Q You said Fairfield, Alabama. Did you mean --

A I said Fairlies, Fairlies, Pennsylvania.

Q Fairlies Hills?

A That's right.

Q Now, this industrial gas producer is not selling in the United States, provide backup arrangementsfor the tonnage plants that they sell in the United States?

A Do the foreign -- I don't understand the question. I'm sorry.

Q Do we have foreign gas companies who also sell tonnage plants in the United States but who are not selling industrial gas; is that correct?

A They sell, on occasion, turnkey plants, the actual sale, rather than tonnage contracts.

Q Do they make any arrangements for backup?

A In the normal commercial understanding, backup is not their responsiblity when they sell a turnkey plant. That is the customer's responsibility.

Q They are not selling gas?

A No, they are just selling the plant, the machinery.

Q Do you know, Mr. Giordano, if foreign companies selling gas in, say, the United Kingdom or in Europe or any foreign company selling tonnage, having tonnage plants for customers, do they have backup?

MR. TOPLIS: I object. I don't understand the question.

JUDGE BARNES: Rephrase the question, Mr. Thurman.

MR. THURMAN: Withdraw the question.

Q Do you know what caused the excess capacity in industrial gases marketed in the late 1960's?

A In the United States?

Q In the United States.

A Yes. As I said yesterday in my direct testimony, the great number of BOF furnace is put in in the steel industry which created a large demand for air separation plants, and therefore created an opportunity for add-on liquid capacity, encouraged all the industrial gas companies to put in capacity. In addition to that, the market for industrial gases, air separation gases, was viewed as being a growth business. It was perceived as having faster growth than actually existed. So the combination of the add-on opportunity plus the misconception of its growth rate, that encouraged capacity far in excess of the current demand.

Q The cutback in the space program, did that have anything to do with this excess of gas?

A Only partly and regionally, because demand for product

in the space program was localized in certain parts of the United States and there was excess capacity in many markets other than markets where the space program was located.

JUDGE BARNES: You mentioned yesterday that there was an over-supply in the Los Angeles area. Would that be because of the cutback?

THE WITNESS: Yes, that was a big product for the space program.

Q When you met with Mr. Smith, did you discuss shortages of supply?

A Which meeting are you referring to?

Q In the Hilton Hotel.

A No.

Q June 30.

A No.

Q Did you state to Mr. Smith at that meeting that demand was running ahead of supply?

A I don't recollect the particulars of something that specific.

Q Did you talk about profitability?

A Yes.

Q What did you say as far as profitability of Airco activities?

A I don't recollect the specifics, but I believe I talked

optimistically about the profit prospects of the company.

Q Highly profitable?

A More profitable than in the past.

Q You said demand was running ahead of supply. Did you tell him that this might end any day?

A I don't think I said that demand was running ahead of supply.

JUDGE BARNES: He said he didn't recall anything that specific.

Q You testified yesterday -- I believe you testified with respect to the shortage ending soon; is that correct?

A I don't think I said "soon." I may have. I elaborated on that point and I made a specific example to the northeast where we are putting a plant in Selkirk and our competitor has announced a new plant, and I said in the cycle of 18 to 24 months when these plants will come on, that shortage will end.

Q You didn't make any prognosis as to the supply and demand balance in the next year or so?

A In the United States?

Q In the United States.

Q We don't look at supply and demand in the United States. We really look at the region, region by region.

Q Mr. Giordano, what is the size of the plant being constructed by Airco at Selkirk?

JUDGE BARNES: Has that been released to the public yet?

THE WITNESS: We released a figure and we are sott of taking a second look at it.

We have announced a plant that will be at least 200 tons, and it may be larger.

Q Now, when you testified yesterday, as to which foreign companies are producing and selling industrial gases but not in the United States, possess necessary factors or certain factors to enter the United States Market, BOC was conspicuoulsy absent. Did you mean to include BOC in that group?

A Yes. If I omitted them, I'm sorry. They certainly qualify along with the Germans, the French and the Swedes as people having the resources you described.

Q I refer you to your testimony whese I believe you stated that there were no companies around of a comparable size to American Cryogenics; is that correct?

A I don't remember whether that is what I said or not. I haven't seen the testimony.

Q Are there still companies around of the approximate size of American Cryogenics?

A Yes, I believe I referred to Big Three.

Q How about Chemetron?

A They were bigger.

Q How about Burdett of Cleveland?

A I don't know what Burdett's current sales are.

Q Are you aware that American Cryogenics was losing around four million dollars a year when they were acquired by Liquid Air?

A No, I wasn't aware of that.

Q Now, what about -- there are companies around, smaller companies, that could be combined and equal the size of American -- in cryogenics; is that correct?

MR. TOPKIS: That is an exercise in arithmetic, your Honor, rather than calling for the witness' testimony.

JUDGE BARNES: Could you combine some of the smaller companies and come up with --

THE WITNESS: Theoretically you could combine 50 distributors and come up with the sales of American Cryogenics.

Q How about producers?

A I just don't know. We would have to take the small independent producers one by one and see if they equalled American Cryogenics.

Q Now, Mr. Giordano, in 1973, did you take into consideration any company, foreign or domestic, who were not producing and selling industrial gases in the United States when you were making your business judgments such as pricing and other business judgments, marketing?

A In the industrial gas business?

Q Yes.

MR. TOPKIS: I am not sure I understand that question. The beginning of it is a little foggy.

MR. THURMAN: You should understand it. You asked the question.

MR. TOPKIS: I asked a question of similar import, I believe.

JUDGE BARNES: You asked a question with regard to BOC.

MR. TOPKIS: Could I have it back, your Honor? Perhaps I am quite wrong and perhaps it is crystal clear.

(Question read.)

MR. TOPKIS: My problem with the question, your Honor, is, I take the question to mean, but it does not say, did you take their possibly entry into the United States into account in making those decisions. That is the question I asked, I believe.

JUDGE BARNES: I assume that could be one element of answering that question.

A Did I consider their possibly entry in the making of marketing decisions in the United States industrial gas business?

Q Right.

A No.

Q I believe you testified, Mr. Giordano, that in the spring of 1973, you did not anticipate BOC would enter

the United States market; is that correct?

A That is correct.

Q Did you know that BOC was looking around?

A No.

Q Did you anticipate any company would enter the U.S. industrial gas markets in the spring of 1973?

MR. TOPKIS: Any company, domestic or foreign?

MR. THURMAN: Yes.

A If the question is, did I consider that there would be a new entrant into the industrial gas business in 1973, the answer is no.

Q Now, did you meet with Mr. Leslie Smith in London on June 30, 1973 for the purpose of having a closer association between BOC and Airco?

A The purpose was to discuss a closer association, yes.

Q What type of closer association were you discussing?

A Well, one of the things we discussed was the possible purchase of shares, Airco shares, by BOC. There were also other potential forms of closer association. We could have bought shares in BOC at the same time they bought shares in Airco.

Q Well, did you make a similar proposal to Linde of Germany?

A No.

Q Did you make a similar proposal to Messer-Griesheim?

A No.

Q Did you make a similar proposal to AGA?

A No.

Q Did you make a similar proposal to any Japanese industrial gas companies?

A No.

Q Now, why did you think BOC might be interested in your proposal, considering in the spring of 1973 you did not anticipate them entering the United States market?

A We, over the past few years prior to 1973,had a very close relationship with BOC. Our top executives and their top executives got to know each other, they worked together and got to know each other well. We shared the same philosophy of business. Also, the similar cultures, the same language. Looking at a potential partner to have a close association with, they were first on our list.

Q Did they express an interest when you talked to Mr. Smith?

A Yes. He expressed an interest inlooking at it, yes.

Q Why didn't you go --

MR. THURMAN: Withdrawn.

Q Who else was on your list?

MR. TOPKIS: What list?

MR. THURMAN: He said they were number one on his list.

MR. TOPKIS: Right, right.

A In examining potential partners, we certainly discussed amongst ourselves at Airco, other companies.

Q Were the companies I just asked you about discussed?

A Oh, yes.

Q Why did you not decide to approach them?

A I thought we would start at the top of the list.

Q The most likely partner; is that right?

A The partner that we were most interested in being affiliated with.

Q Now, Mr. Giordano, did you know at the time of your meeting with Mr. Smith that BOC already had under consideration acquiring Airco?

A No.

Q Mr. Giordano, were you told by Mr. Laister that the principal reason BOC wanted to acquire Airco was that BOC wanted a position in the U.S. industrial gas market?

MR. TOPKIS: Could I have that question back, please, your Honor?

JUDGE BARNES: Read the question back, please.

(Question read.)

MR. TOPKIS: Is that at any time? There has been no prior testimony about any meeting between Mr. Giordano and Mr. Laister except, I think, a reference to a meeting in New York subsequently. I don't know what the question is addressed to.

JUDGE BARNES: How far back in time do you want to go?

MR. THURMAN: 1973.

A I have had so many conversations with Mr. Laister about the acquisitions of the shares and the reasons for it, I can't say when that particular one came up.

Q Do you remember any specific conversation you had with him where there was specific discussions about what this possible acquisition would do for BOC?

A Specific conversation, no.

Q I would like to refer to your testimony on the 18th of December, 1973, on transcript page 130, lines 2, 3, 4, 5 and 6, I quote:

"Q. Did any officers in British Oxygen or managing directors there comment to you as to the reasons for making a tender offer for the stock of Airco?"

The answer was:

"Yes."

We go down to a portion of your answer on the same page, line 22 through 25 and line 2 of transcript page 131 where you stated: "The acquisition of a position in Airco and possibly a subsequent merger would enable them to have that position in the U.S. market in businesses which they understand because they manage similar businesses themselves."

Is that a correct --

A That sounds right. That recollection was closer to

the event. That sounds reasonable.

MR. TOPKIS: May I read the witness the entire question and answer so as to make it perfectly clear?

MR. THURMAN: He can do it on redirect.

MR. TOPKIS: This was done to Queen Anne in 1822. It was said that you can't --

MR. THURMAN: At the proper time.

MR. TOPKIS: At the very time.

JUDGE BARNES: Did you read a complete question and answer?

MR. THURMAN: No, I did not. This is the only thing that I wanted read in the record.

Mr. Topkis can have redirect. If he can interrupt the cross-examination and start his redirect at that time, there is no point in going into redirect.

JUDGE BARNES: I think the question, the complete question and answer, should be read to the witness in all fairness. You don't read a half a question and a half an answer.

MR. THURMAN: If the answer is clear, if it takes a whole question and answer so it is not read out of context, I agree with you. If it is clear as to what was said, there is no point inreading all the statements.

JUDGE BARNES: The witness should at least be presented the full question and answer either orallyor visually. You

should have given him the transcript if you weren't going to read the entire question and answer.

Mr. Topkis, you may read the entire question and answer.

MR. THURMAN: He may read this to himself. He said that what he said was correct.

JUDGE BARNES: We will now have the complete question and answer read.

MR. THURMAN: I take exception to your Honor's question, it is really improper.

MR. TOPKIS: The first question and answer was read accurately now:

"Q. Would you please describe the statements made?

"A. Well, the principal reason is that they would like to have businesses in the United States market.

"Q. Who said that?

"A. Managing directors of BOC in discussions with Mr. Laister, for example.

"Q. When did he say that?

"A. I don't recollect the precise time. In the course of our discussions over the past six months.

"Q. Go ahead.

"A. They regard the United States market as probably the strongest economy in the world, one that will still enjoy a fairly respectable growth rate, the acquisition in Aireo and possibly a subsequent merger would enable them to have

that position in the U.S. market in businesses that they understand because they manage similar businesses themselves."

Thank you, your Honor.

MR. THURMAN: I might add that there is certainly nothing that we did not want in the record there. What I read was what we are particularly concerned with.

JUDGE BARNES: Well, in this proceeding, from hence forward, let's read the entire question and answer to the witness or show him the transcript if you are going to read only a portion of it.

Q Mr. Giordano, what firms are Airco's competitors in the sale of industrial gas in the United States?

A What firms are Airco's competitors?

Q Yes.

A All of the industrial gases?

Q Yes.

MR. TOPKIS: This is across the United States?

MR. THURMAN: Is that an objection?

JUDGE BARNES: He did not limit it, so I assume it is within the United States.

MR. THURMAN: I think it is clear. If Mr. Topkis has an objection, let him state it without making comments.

MR. TOPKIS: I just want to make sure that I understand the question.

A Do you want to know the competitors of each of the

industrial gases in the United States?

Q Yes.

A Because there are different competitors for different industrial gases.

Q Yes.

A In atmospheric gases we have Union Carbide, Air Products and Chemicals, Chemetron, Big Three. There are five or six other independent companies that make and sell atmospheric gases.

In carbon dioxide we have Chemetron, Liquid Carbonic, and maybe four or five other companies that make and sell carbon dioxide.

In helium we have Union Carbide, Air Products and Chemicals, Gardner Cryogenics, the producers that I mentioned earlier. And, of course, all of the other smaller industrial gas manufacturers also market helium.

In the fuel gases, it would include all of the industrial gas manufacturers that I mentioned.

In hydrogen it would be principally Air Products and Union Carbide, but again, all of the other industrial gas manufacturers would also market hydrogen.

In the rare and specialty gases, probably most of the industrial gas producers would market rare and specialty gases.

I believe that covers most of them.

JUDGE BARNES: Where do medical gases fit into this?

THE WITNESS: Well, the medical gases, if you are referring to oxygen, are sold by Airco through a separate marketing organization, but, however, most of the other companies will market oxygen to hospitals directly through the industrial gas marketing arm.

JUDGE BARNES: You work through your medical products division?

THE WITNESS: Right.

JUDGE BARNES: Would that be the Ohio Medical Products Division?

THE WITNESS: Yes.

Q Mr. Giordano, why does Airco market the particular group of gases that it does?

A Why does it market --

Q Do you have a reason why you market all these industrial gases?

A To make money.

Q When you refer to fuel gases, were you referring basically to acetylene?

A Acetylene and MAPP, yes.

Q Back to the question of why you market -- why do you market gases which you do not produce?

A Which gases are you referring to?

Q Well, your knowledge is better than mine in the gases that you produce and --

A Well, some of the gases that we market and don't produce have a good fit with another gas. For example, MAPP is a fuel gas used in the oxy-fuel process to cut. So, we have a provident opportunity to market a fuel gas with oxygen even if we don't manufacture the fuel gas. However, helium, we don't have to market helium to be in the other gases. We market helium because it is a profitable opportunity for us.

Another example is hydrogen. We don't have to market hydrogen. They go into different markets than the oxygen, for example.

Q There is money in other business profits, why do you not market automobiles rather than market helium?

A I don't think there would be much money for us in automobiles.

Q How about automobile parts?

A It might be interesting. I don't know. I would have to look at it.

JUDGE BARNES: Helium does fit your business better than automobile parts, doesn't it, Mr. Giordano?

THE WITNESS: Yes. But what I was trying to say is that it is not a product that we need to carry to be in the rest. That's the point I was trying to make.

JUDGE BARNES: What percentage of your dollar sales would be to distributors in industrial gases?

THE WITNESS: About 32, 33 percent, dollar sales.

Q Mr. Giordano, who are Airco's eight largest competitors in the United States in the air separation gases?

A Eight largest competitors in the air separation gases?

Q Yes.

A Union Carbide, Air Products and Chemicals, Chemetron, Big Three, Linde, Air Products, Chemetron, Liquid Air --

Q I will make it just seven, because I assume Airco is one of the eight.

A Airco is the seventh -- do I have them all? I think you have them.

Liquid Air, Linde, Air Products, Chemetron, Big Three, Airco.

MR. TOPKIS: Do you want to try Liquid Carbonics?

THE WITNESS: I guess that is at the bottom. He said air separation. They are quite a small factor in air separation, so they came last on my list.

Q Which of the companies that you have just named, Mr. Giordano, compete with Airco throughout the United States?

MR. TOPKIS: Could I have that question back, please?

JUDGE BARNES: Read it back, please.

(Question read.)

MR. TOPKIS: This is in air separation gases, I take it?

A Is it?

Q Yes.

A Linde Division of Union Carbide, Air Products and Chemicals,

I think you might include Chemetron there, but to a lesser extent. The other companies I have mentioned do not compete against Airco all over the United States.

Q Mr. Giordano, is Airco's air separation plant selling at the full capacity today?

A Is that tonnage or merchant or both?

Q Both.

A No.

Q Which ones are?

A We are getting into some information here which is --

Q Well, how many are or how many are not, either way?

JUDGE BARNES: Are you going to include the tonnage plants in that?

Q Are all tonnage plants at full capacity?

A No, but they are fully committed.

Looking at the merchant plants, we have at least four plants out of the total that are not selling at full capacity.

Q Four out of how many?

A Well, four out of the nine or ten that are major plants. I am excluding some of the very small ones.

Q How many small plants do you have?

A Perhaps four that we would classify as small.

Q What areas of the country are those four that are at the capacity --

MR. WOLLEN: Your Honor, I think we are getting into an

area where the information is pretty sensitive, competitively speaking.

JUDGE BARNES: Yes.

I wonder why this is necessary? He said he has four that are not up to capacity. Do we have to know where they are? What is that going to prove?

MR. THURMAN: It could be in a small area where there is no market for it.

I will withdraw the question.

It could be in an area where there is very little industry. I will withdraw the question if it is sensitive.

JUDGE BARNES: Mr. Giordano, looking at your annual report, you have one liquid hydrogen plant, would you market the hydrogen throughout the country from that plant?

THE WITNESS: No. We market it sometimes as far as five or six hundred miles away, but right now I would say we are selling all of it within 200 miles of the plant.

JUDGE BARNES: You have one rare gases plant, would you market those gases nationwide?

THE WITNESS: Those are gases in small containers that we can ship. We are adding rare and specialty gases around the country for reduction of distribution expense.

Q Mr. Giordano, I believe you testified that you made studies of the industry and you knew what the rate of returns of your competitors were. Now, would you tell us what the

rate of return is of Big Three?

A I think we said we made an educated guess based on the facts that we could glean.

Q That's good enough. What is your educated guess to Big Three's rate of return?

A I would have to look at some of our work to check --

Q It would be high, wouldn't it?

A I don't know. I don't think so.

Q What about Air Products?

A I'm a little more familiar with that. No, that would not be high.

Q What would it be?

MR. TOPKIS: In what field is this? Air separation gases? Industrial gases --

MR. THURMAN: Industrial gases.

A In the way I have been using "return" here, I have been talking about return on total capital employed that is not affected by high borrowings or things of that character. I would guess Air Products' return on the gas business would be something like 6 to 8 percent on total capital employed.

Q Do you know who the most profitable company is in the industrial gas business in the United States?

A By what measure are you referring?

Q Which one has the highest net profit.

A The largest company would have the highest net profit,

that would be Union Carbide.

Q I guess my question then is rate of return.

MR. TOPKIS: On sales or total invested capital?

MR. THURMAN: I guess the best way to get the record clear on this would be the studies you have made.

A I will tell you how we go about it. First there is the published information, the annual reports and the 10-K's, and we look at how the sales and profits have been reported by the company. In some cases they are reported by line or product which enables us to identify it by industrial gases. Then we take the total invested capital of the company without reference to debt and we do some allocations of our own that we think are reasonable. In some cases we would take the total invested capital and allocate it by sales. We would estimate the tax of that company by looking at the company's average tax rate for the year on its whole business. Again, there, we would assume that the tax rate on the gas business would be roughly similar to the tax rate on the balance of the business. Having deducted the taxes and looking at the net profit before tax as reported and allocated the investment, we could come up with a pretty good idea, educated guess, on what their return on the business is.

JUDGE BARNES: Is this return on invested capital?

THE WITNESS: That is correct, that is what we are trying to measure.

A company like Linde Division of Union Carbide, that is difficult because they are a division of a larger company and their sales figures are included in a fairly large group which has other businesses aside from gases. In that case our guesses are not as good, but we try to work out what we think they are making, given what we know about their plants and the prices in the marketplace, et ceteras. That is the most difficult because the figures are buried in a morass of other figures.

In the case of Big Three, we are looking at a company that is almost wholly industrial gases, and it is a little easier.

Q Now, on the profit figure that you look at, which company is most profitable in industrial gases?

A I would have to go back on that an refresh my recollection on that. We run the numbers a number of times on different companies.

JUDGE BARNES: They don't stand out in your mind?

THE WITNESS: None of them stand out as being more profitable than the other.

Q You wouldn't know the top four profitable companies?

A I couldn't answer that.

JUDGE BARNES: Let's take a ten-minute recess.

(Recess.)

JUDGE BARNES: Proceed.

BY MR. THURMAN:

Q Mr. Giordano, has Airco ever supplied another industrial gases producer with backup?

A By backup do you mean for a tonnage contract?

Q Tonnage plant, yes.

A On an emergency basis that could be possible. I don't remember any specific instances.

Q Have other industrial gases producers ever supplied Airco backup for tonnage plants?

A I can't recall in the recent past. It is possible.

Q Does Airco have any exchange agreements with companies?

A Yes, we have exchange agreements in industrial gases for oxygen, nitrogen, where we take product in some locations and try to swap it for product in other locations.

Q How many exchange agreements do you have?

A Two or three.

Q With whom?

MR. TOPKIS: Does that really make any difference?

MR. THURMAN: This exchange agreement was brought up for the first time with Mr. Giordano on direct.

MR. TOPKIS: Perhaps the witness has no objection to answering, but it seems like something confidential that there is no point in going into.

JUDGE BARNES: How do you feel about that?

THE WITNESS: With two or three of the other industrial

gas companies.

JUDGE BARNES: The larger ones?

THE WITNESS: Yes.

Q How long have they been in effect?

A They are short-term. We will make one like for a year, and the source will run out, and then we will make another one for another year. They are set up by location.

Q For about a year?

A A year or shorter. When it is used up, it is no longer available, and you move on to something else.

JUDGE BARNES: You would have an exchange agreement where you have a customer and if you lost the customer the agreement would run out?

THE WITNESS: No. What happens is Union Carbide has product available out of their Chicago plant, if they can't sell it to one of their customers, they will sell it to us. If their customers want it, they will bump us first because they are not really interested in us, and sell it to their customers. Then we will try to move on to another spot.

Q Other than exchange agreements, have you ever purchased backup from your competitors?

A Purchased backup? I don't think so.

Q If you didn't have an exchange agreement and you needed some gas at a particular tonnage plant, have you ever gone out and purchased?

A Not to my recollection. The only place we have ever purchased product in the United States, I believe, was in Texas. I am talking about oxygen now.

Q Tonnage?

A We don't purchase tonnage. We would purchase merchant liquid oxygen from time to time.

Q If that plant booke down and you didn't have an exchange agreement, how would you take care of the plant?

A Generally we have been able to back up ourselves.

Q From another one of your plants?

A From one of our own plants, yes.

Q Now, Mr. Giordano, after the July 25 agreement we discussed earlier, did Airco and BOC enter into any other agreements?

A Yes. We signed an agreement on December 10, I believe.

Q I show you Commission Exhibit 108-A through C; is that the agreement you were referring to?

A Yes.

Q What were the events leading up to this agreement?

A At this particular time, we were discussing with BOC the possibility that they would come in and make an offer to buy shares in Airco. And at that time there was an outstanding tender offer by the Curtis-Wright Company to purchase a certain number of shares of Airco.

Q Did Airco's borad of directors oppose the tender offer for Airco's shares by Curtis-Wright Corporation?

A Yes.

Q Did Airco's board of directors send letters to Airco's shareholders urging them to reject the Curtis-Wright tender offer?

A I don't know that the Airco board did. The management cooperated with BOC by mailing material to our shareholders.

Q Urging them to reject the Curtis-Wright offer?

MR. TOPKIS: I hate to do this, but I think I have to again raise the best evidence rule. If a letter was sent out it would be the best evidence of what was said.

JUDGE BARNES: I will permit Mr. Giorano to say if the letter urged the Airco shareholders to reject Curtis-Wright.

A Yes.

Q Airco's borad of directors supported the tender offer of BOC for Airco's shares?

A Well, I would have to speak carefully here, because there are a lot of distinctions between support, cooperate, and endorse. The Airco board agreed to cooperate with the offer made by BOC. We did not endorse the terms and the price of the offer.

Q The board consented to BOC's offer, didn't it?

A Yes.

Q Did Airco mail BOC's tender offer to Airco's shareholders?

A I believe we handled the mailing of the material, yes.

JUDGE BARNES: Does that mean you paid the expense of

mailing also?

THE WITNESS: I doubt we paid the expense. I am sure we just cooperated.

Q I show you Commission Exhibit 125-Z9. Is that the letter that went to the stockholders?

A I don't know. This looks like a mark-up. I am not certain that that is the one that went to the stockholders.

Q That's what I wanted to ask you. The mark-ups on it --

A I don't know. I would have to see the one that actually went before I could tell us whether this is the same.

Q Who would know whether this was the one that was actually sent or not?

A Our secretary would have it in his filed. I am sure we could get it out of there.

JUDGE BARNES: Would the SEC have a copy of that letter?

THE WITNESS: Oh, yes.

MR. THURMAN: As I understand it, your Honor, this was what was filed with the mark-ups with the Securities and Exchange Commission by BOC. I was just trying to confirm with this witness as to whether it is correct or not.

JUDGE BARNES: If you can answer him --

A I don't know. If that was filed, then that is it, but I don't have a recollection of it.

Q Have any of BOC's representatives been seated on Airco's board of directors?

A Yes.

Q And how many?

A Four.

Q Who are they?

A Sir Geoffrey Ely, Leslie Smith, Peter Laister and Chris Hesketh-Jones.

Q When were they seated?

A I believe at our January or February meeting.

Q When was it effective?

A At that time.

Q '74?

A I beg your pardon?

Q 1974?

A Yes.

MR. TOPKIS: So no error should creep into the record, they may have been elected then. I don't think they took their seats until some time later.

Q Have any Airco representatives been seated on BOC's board of directors?

A Yes.

Q How many?

A Two.

Q Who are those people?

A Myself and Mr. Dillon.

Q When were you and Mr. Dillon seated?

A I will probably get corrected, but I think it was March.

Q Of this year?

A Of this year.

Q Mr. Giordano, other than BOC's 35 percent share of Airco, what is the next largest percentage held by any company or individual?

A I don't remember with precision, but there is no holder at anything close to 35 percent.

Q Do you know if it would be like three percent?

A It might be three percent. I don't know. You would have to refer to the records.

Q Other than members of the board of BOC, representatives on the board, do you know what percentage of BOC shares would be held by the board of directors?

A There is one other person on the board representing a company that owns maybe 350 or 400 thousand shares of Airco.

Q Do you know if that is the second largest holding in the company?

A I don't know for sure. I would have to make reference to the records.

Q Did you personally tender any Airco shares to BOC?

A No.

Q Did you personally tender any of Airco's shares to Curtis-Wright?

A No.

Q Did you personally support BOC's tender offer?

A Yes.

Q Did you personally support Curtis-Wright's tender offer?

A No.

Q Mr. Giordano, four years at Shearman and Sterling, what department were you in?

MR. TOPKIS: I object. What difference does it make?

MR. THURMAN: It may make some difference.

What is your objection?

MR. TOPKIS: It hasn't the slightest relevance to this litigation whether Mr. Giordano was in the litigation department, trust and estates, theatrical. I don't know the other departments of Shearman and Sterling.

JUDGE BARNES: I don't know what relevance it has.

MR. THURMAN: His skill in litigation.

JUDGE BARNES: Go ahead and answer it.

A I spend a year in banking, a year in corporate matters, I spent a year in some litigation matters, and a year in tax work.

MR. THURMAN: No further questions, your Honor.

MR. WOLLEN: I just have a few questions on redirect.

REDIRECT EXAMINATION

BY MR. WOLLEN:

Q Do you remember Mr. Thurman asking you whether Airco supported the BOC offer and didn't support the Curtis-Wright

offer, do you remember what the price per share was of the Curtis-Wright offer?

A The Curtis-Wright offer was $18 a share and the BOC offer was $20 a share.

MR. WOLLEN: That's all.

BY MR. TOPKIS:

Q In those periods when you were in litigation, what type of litigation did you do?

A I have trouble recollecting.

Q It was suggested to me that you had some distinction in pro bono work.

A I did spend six months on a very complicated narcotics case in the district of New York.

Q So that the record may be absolutely clear, whose side --

A Defendant.

JUDGE BARNES: You represented the defendant?

THE WITNESS: Yes.

Q You testified in response to a question from Mr. Thurman that when you take a look at the supply-demand picture, you don't do it nationally but region by region. Do you remember that question?

A Yes.

Q Could you explain to us why you do that?

A The business is essentially a regional one. As I testified yesterday, the product cannot be moved profitably

or economically beyond, say, 200 or 250 miles from the plant. Consequently, a large excess in, say, New Orleans of oxygen really has no impact on a shortage of oxygen in Boston.

Q I see.

Now, you were asked also by Mr. Thurman whether it would be possible to take a whole bunch of small independent producers and see if their sales added up to the equal of American Cryogenics as American Cryogenics' sales stood when it was acquired by Liquid Air. Do you remember that testimony or that question?

A Yes.

Q I would put this question to you, sir: In your judgement would it make any business sense to acquire a whole bunch of such independent producers whose sales might or might not equal up to that of American Cryogenics?

A If your objective is to create a company that was going to be profitable long-term in the industrial gas market in the United States, the answer is no, it would not make any sense.

Q Thank you.

You were asked whether at the time of your talk with Mr. L.E. Smith on June 30, 1973, you knew whther or not BOC was already considering the acquisition of an interest or some relationship with Airco. Do you remember that?

A Yes.

Q I will ask you, sir, did you know, had you been informed that Mr. David Craig of Airco and Mr. Peter Laister of BOC had a discussion that was testified to yesterday by L.E. Smith?

A I knew of a discussion by Mr. Craig and Mr. Laister. That discussion had been reported to me by Mr. Craig, yes.

Q Now, you were asked what companies compete with Airco as to each of a variety of gases, and do I understand your testimony to be, taking all of them collectively, that some companies compete with you in one area and some in other and some compete with you in some gases and not in other and it may vary gas to gas and area to area?

A Yes.

Q I think you testified also that you sell, in response to a question from his Honor, that you sell your medical oxygen through your Ohio Medical Division; is that right?

A Yes.

Q That Ohio Medical Division has a separate sales staff?

A Yes.

Q Calling on hospitals?

A Yes.

MR. THURMAN: He is leading the witness again, your Honor

JUDGE BARNES: You are leading him.

MR. TOPKIS: I am sorry.

Q Does it have a separate sales staff?

A Yes, it does.

Q Does that sales staff sell any other gases?

A It sells other medical gases.

Q Nitrous oxide?

A Nitrous oxide, cyclopropane, some helium for use in the hospital room. It of course would also sell the anesthetic agents.

Q Any carbon dioxide?

A There is often a very small carbon dioxide cylinder within proximity of the operating table.

JUDGE BARNES: Is that a fire preventative?

THE WITNESS: They like to have whatever gases they may need to restore the balances of gases in the breathing process. The CO_2 is taken out in the soda cannister that I referred to yesterday.

Q You said, I think, that you market helium because it is a profitable opportunity and you market hydrogen for the same reason. You said then, if my notes are correct, they go in to different markets than oxygen. By "they," did you mean helium and hydrogen?

A Yes.

Q Do they go into different markets from each other?

A Yes.

Let me modify that to say that in some cases, for example, helium going in to welding, helium is going in at the same place that oxygen might be there for cutting or argon

might be there for welding. There are many applications of helium where it is going into a market where these other gases do not appear. Similarly in the case of CO_2, the beverage market and the food market, most of these other gases do not go into those markets.

Q You said, I believe, that helium is not a product we need to carry to be in the rest of the gases. Are there any other gases which you happen to market of which you could make the same statement?

A Yes, CO_2 for example is not a product that you need to be in to be in industrial gases, and by example of that, both Air Products and Union Carbide are not in the CO_2 business.

Q How about hydrogen, sir?

A Hydeogen is another one as well that you could well do without and still be in the business.

Q How about carbon monoxide?

A We don't seil carbond monoxide.

Q And I gather there are various of your competitors, indeed almost all of your competitors don't carry MAPP?

A That is correct.

Q How about nitrous oxide?

A Unless the company is selling to the hospitals, it would not carry nitrous oxide.

Q I see.

MR. THURMAN: Objection, your Honor. We had witnesses from those companies stating what they carried. Going back to Mr. Topkis's best evidence rule. Those witnesses stating what they carried is certainly relevant and no further questions should be asked along this line of this witness.

Q Now, you testified as to the air separation gases that your leading competitors around the country in those gases were Union Carbide, Air Products, Chemetron, Big Three, Liquid Air and Liquid Carbonic. Do you remember that testimony, sir?

A Yes.

Q Now, let me ask you, do you know, as to each of those companies, whether the proportion of their sales of industrial gases is the same --

MR. TOPKIS: I will start again.

Q As to those companies, each of them selling air separation gases, do the sales of air separation gases bear the same ratio to their total sales of industrial gases?

MR. THURMAN: Objection. The best evidence rule again --

MR. TOPKIS: I asked if the witness knows.

MR. THURMAN: This was asked of the other witnesses.

JUDGE BARNES: This doesn't know that Mr. Giordano's answer is going to be the best evidence in the proceeding. If he knows, I will permit him to answer.

MR. THURMAN: I would like some foundation. If he

answers I guess it would be yes or no. Now and then we would like to know how he knows.

JUDGE BARNES: Do you know, sir?

THE WITNESS: Yes, I do. The reason why I do know is that I know in the case of two of them they do not sell CO_2. To the extent that we sell CO_2, and it is a substantial product line for us, our ratio of atmospheric gases to total industrial gases would be different there.

Q Are there any other similar dividing lines that you draw?

A Yes. Both Air Products and Union Carbide have a much more sustantial hydeogen business than we do. That would alter the ratio. We have a larger helium business than some of the others. That would have the impact of altering the ratio.

Q We have spoken here of acetylene being used here for fuel. Are there any other uses of acetylene?

A Yes. Acetylene is used as a feedstock for -- chemical base feedstock by DuPont and by GAF, companies of that sort.

Q And they are in the chemical business?

A That is correct.

Q Do you happen to know, does DuPont use acetylene in the creation of a leather substitute?

MR. THURMAN: Objection. This is beyond the scope of cross-examination.

JUDGE BARNES: I will permit the question. We might as well exhaust the witness' --

A They used to use it in the making of a product which I believe was a rubber or leather substitute.

Q Corfam?

A I don't know that.

Q You were asked by Mr. Thurman to state the findings of your analysis of the return on invested capital of some of your competitors, and I think you testified that in Air Products, in industiral gases, that it was your estimate that their return on invested capital was between 6 and 8 percent?

A My reference would be to 1973 or prior years.

Q Could you give us the same estimate as to the -- to Chemetron?

A Not from recollection.

Q Could you give it as to Liquid Carbonics?

A Not to my recollection.

MR. THURMAN: Objection. He stated he couldn't make any estimates on cross-examination. I don't know how he can on redirect now.

JUDGE BARNES: To that extent his testimony will be in conflict and might go to the weight. If he wants to answer the question, let him answer it.

Q Do you recall the figure that you estimated for Liquid Air?

A No.

Q Were any of them significantly above 8 percent?

A No.

Q Go ahead.

A My recollection is, as I testified on cross. they were reasonably close to one another and none of them were terribly high.

MR. TOPKIS: Thank you very much, Mr. Giordano.

JUDGE BARNES: We will take a five-minute recess.

(Recess taken.)

JUDGE BARNES: On the record.

RECROSS EXAMINATION

BY MR. THURMAN:

Q Mr. Giordano, I believe you testified Airco has a network of distributors; is that correct?

MR. TOPKIS: I don't remember asking about a network of distributors, your Honor, not on redirect at any rate.

MR. THURMAN: The next question gets to it.

I will withdraw that question. It wasn't even a question.

JUDGE BARNES: He sells to distributors. I don't recall the word "network."

Q Does Airco attempt to sell to its distributors, the wide ranges of industrial gases?

A Do we attempt to sell our distributors a range of

industrial gases"

A Yes.

Q Now, was the rate of return in sales in 1972 for Airco's industrial gas business higher than 9 percent?

MR. TOPKIS: Objection, your Honor. There has been no discussion here with regard to return on sales.

MR. THURMAN: I thought we had been going all through this.

MR. TOPKIS: No. Return on invested capital.

MR. THURMAN: As long as we are talking about returns and profitability, once you've gotten into it you can expand on it.

JUDGE BARNES: Do you want just his return on sales or the whole industry's return on sales?

MR. THURMAN: His return on sales in 1972.

A We don't look at our business that way. Without going back and giving you the calculation, I couldn't give you the return on sales.

Q Mr. Simpson testified in an investigational hearing that Airco's sales, return on sales of industrial gases was 15.5 percent in 1972; does that sound correct?

MR. TOPKIS: Objection. I don't know who Mr. Simpson is.

MR. WOLBEN: I know who he is but he didn't testify during the investigation.

MR. TOPKIS: What kind of cfoss-examination is it to

start talking about something without showing it to the witness?

JUDGE BARNES: Well, if he recalls the testimony, the question would be proper, but -- do you want to rephrase the question?

MR. WOLLEN: Mr. Simpson did not testify during the investigation, your Honor.

MR. THURMAN: He did.

MR. WOLLEN: Where is his transcript?

MR. THURMAN: We dont have a transcript and I don't think it is necessary to have the transcript.

Q Do you know who Mr. Simpson is, Mr. Giordano?

A Mr. Charles Simpson?

Q Yes.

A Yes, I know a Mr. Charles Simpson.

Q Is he employed by Airco? In 1972 was he employed by Airco?

A Yes, he was employed in 1972 by Airco.

Q What was his position in 1972?

A He was, in 1972, he was president of our industrial gases division.

Q Now, Mr. Simpson told Mr. Youngwood that the return rate on sales for industrial gases in 1972 was 15.5 percent. Do you agree with that figure?

A I don't know. I could go back and calculate it. We

don't look at our business in terms of returns on sales.

Q Does it sound reasonable?

A I just don't know.

MR. TOPKIS: What it sounds like is double hearsay.

Q I believe you testified on redirect, it doesn't make sense to put small companies together. Are you saying that Liquid Air is committing suicide?

A No, I am not saying that. My answer to the question was, if your objective is to create a viable profit business for the long-term in the industrial gas industry in the United states, the putting together of 30 to 50 distributors to equal the size of American Cryogenics doesn't make sense.

Q How about three or four producers?

A Which ones do you have in mind?

Q I would say Burdett of Cleveland or Burdett of Norristown or Alabama Oxygen or Pacific Oxygen.

A Those four?

Q Any four.

A Those four would not make sense.

Q Why?

A One is in Alabama, one is in Cleveland, one was in the pacific coast, and one is in the east in Norristown, and one is in Cleveland. All in different markets, some very competitive markets. On that basis, no.

Q You testified Liquid Air was one of the top eight

people in the United States?

A Yes.

Q Where was Gulf Oxygen located?

A In the Gulf states, Mississippi.

Q Where was Industrial Products located?

A Northwest.

Q Where was American Cryogenics located?

A Spread out quite a bit through those areas you have mentioned.

Q Where was Dye Oxygen Company?

A Phoenix.

Q So it is your testimony that Liquid Air is going under?

A I didn't testify to that.

Q I thought you said on the long run you couldn't put three or four companies together like that.

A I would like the testimony again. I said if your principal objective is to create a viable company for the long-term in the industrial gas business, putting the four companies that you mentioned previously doesn't make sense.

Q Becaus of their location.

A Not just because of their location. Number 1, IAP has had a very strong position inthe northwestern markets. It is the size of the company in relation to the other competition that makes the differenee. Alabama Oxygen, however, has a 25-ton plant and is a very small company in a

town where Airco has a thousand-ton plant with a 200 ton liquifier and has been in business in Birmingham for many, many years.

Q Gulf Oxygen was located in an area where Big Three dominates; correct?

A That is correct. I wouldn't have bought Gulf Oxygen.

Q So in the long run, Liquid Aid is not going to be viable?

A Mr. Thurman, that is your conclusion.

Q That is a conclusion the judge will have to infer. We will stop there.

A Fair enough.

MR. THURMAN: No further questions.

MR. TOPKIS: Nothing further, your Honor.

JUDGE BARNES: I have a couple of questions.

You said you went to London in June of 1973?

THE WITNESS: Correct.

JUDGE BARNES: Prior to that visit, what had been Airco's contacts with BOC in the previous six months or a year?

THE WITNESS: I don't think I had any contact with BOC say for the previous six months or a year. The last contact I would have had would be at about the time we terminated the joint venture which has been referred to in the testimony.

JUDGE BARNES: When was that?

THE WITNESS: That was probably in '71 or late '70.

JUDGE BARNES: How about other officials of Airco?

THE WITNESS: Mr. Craig had had a conversation with Mr. Laister which has been referred to in the testimony and they may have seen each other on a social basis in that period, I don't know.

JUDGE BARNES: What was the time frame for Mr. Craig's meeting with Mr. Laister?

THE WITNESS: No more than a month prior to my meeting with Mr. Smith on June 30.

JUDGE BARNES: What was reported to you as to the discussion between Mr. Craig and Mr. Laister?

THE WITNESS: Mr. Craig reported to me that Mr. Laister had suggested some interest of association but it had come through so vague that really Mr. Craig was asking me to go to London or asking one of us to sort out what the real interest was, and that was really the purpose of my visit to London.

JUDGE BARNES: Was the visit to London your own idea, were you going seeking a merger?

THE WITNESS: I was going seeking some closer association, yes. Airco was taking the initiative in asking for this meeting.

JUDGE BARNES: What kind of association did Airco need?

THE WITNESS: Because of our low PE ratio in that period, other companies were in the same situation, we felt

we might be vulnerable to a tender offer from some other company. We thought we would take the initiative and perhaps seek a partner of our choice rather than to wait for someone to come in with a tender offer who might be unfriendly.

JUDGE BARNES: Mr. Laister's meeting with Mr. Craig didn't stir your interest in any way to go into BOC?

THE WITNESS: It did stir our interest. We were trying to find out what the words said at the meeting meant. We thought we were hearing some indication of interest but we weren't sure. My purpose of going to London onJune 30 was to find out whehther there was any interest.

JUDGE BARNES: Did you know after your meeting in London that BOC intended to or was possibly considering entering the U.S. gas market?

THE WITNESS: No.

JUDGE BARNES: There were discussions of possible acquisition of Airco stock; isn't that what you testified to?

THE WITNESS: The possibility of acquisition of Airco stock was one possibility.

JUDGE BARNES: That was discussed?

THE WITNESS: Yes.

JUDGE BARNES: I have no further questions.

Does anyone else desire to ask any further questions?

MR. TOPKIS: No, your Honor.

MR. THURMAN: May we have a minute, your Honor? There

may be a question we want to ask.

JUDGE BARNES: Yes.

(Pause.)

MR. THURMAN: We have no further questions.

JUDGE BARNES: Thank you very much, Mr. Giordano.

(Witness excused.)

JUDGE BARNES: Do we have another witness we can start with now?

MR. TOPKIS: Yes, your Honor. Mr. Ray Dow. Mr. Kaplan will examine.

RAY DOW

called as a witness on behalf of respondent British Oxygen Company, Ltd., was duly sworn by Judge Barnes and testified as follows:

DIRECT EXAMINATION

BY MR. KAPLAN:

Q Mr. Dow, you are the president of CANOX; is that right?

A That is correct.

Q You graduated from Toronoto University in 1949; is that correct?

A That is correct.

Q With what degree?

A Bachelor of engineering, mechanical.

Q Prior to your education, did you see some military service?

A Yes, Army Corps.

Q Royal Canadian Army Corps?

A Yes.

Q During the last war?

A Yes.

Q Where did you serve, sir?

A In Canada.

Q Now, sir, after you graduated from Toronto University in 1949, you went to work for Union Carbide?

A That's right.

Q In Candda?

A Yes.

Q What division were you employed at?

A Linde Gases Division.

Q How long were you with Union Carbide?

A Ten years.

Q What position did you hold?

A Service engineer, salesman. Branch manager and manager of distributor sales.

Q That was all in their gases division?

A Yes.

Q Following your experience with Union Carbide, you joined Airco of Canada and then Air Reduction; is that right?

A Yes.

Q That was in 1959?

A Yes.

Q What was your position with Airco of Canada?

A Assistant sales manager of CO_2.

Q What -- was CO_2 a separate division of Airco?

A They were just introducing it into Canada at that time.

Q In 1960 you joined CANOX?

A Yes.

Q What was your position with CANOX?

A General sales manager.

Q Will you trace for us the positions you have held and the responsibilities with CANOX at that time?

A 1963, vice president, sales; 1969, executive vice president; 1973, president.

Q As president, what are your duties and responsibilities with CANOX?

A I am the chief operating officer and my duties are to run the day to day operations and anything that is involved.

A Now, sir, CANOX is engaged in selling gases of various kinds?

A Yes.

Q What gases does CANOX sell?

A The air separation gases, fuel gases, and medical gases.

Q Specifically what gases do you include in the fuel gases?

A Acetylene and propane.

Q What gases do you include in the category of medical

gases?

A Medical oxygen, nitrous oxide, cyclopropane.

Q Do you sell any hydrogen?

A A little bit.

Q Do you sell any helium?

A A little bit.

Q Do you sell any carbon dioxide?

A Yes.

Q Do you sell carbon monoxide?

A No.

Q Now, sir, which of these gases does CANOX make as opposed to purchasing from other sources?

A Oxygen and nitrogen and acetylene.

Q The other gases you mentioned you buy from other sources and resell; is that correct?

A That is correct.

Q Now, you make the oxygen and nitrogen with a piece of equipment, sir?

A With a 20-ton plant.

Q An air separation plant?

A Yes.

Q Does that plant produce argon?

A No.

Q Do you sell argon?

A Yes.

Q Where do you get it from?

A Canadian Liquid Air.

Q Where do you get the propane from?

A Superior Propane.

Q Where do you obtain the nitrous oxide?

A Puritan Bennett.

Q Where do you get the hydrogen?

A Liquid Carbonics.

Q Where do you obtain the helium?

A Canadian Helium, Ltd.

Q Where do you get the carbon dioxide?

A We produce that jointly ourselves.

Q When you say jointly --

A We have a joint production venture with Canadian Liquid Air.

Q Will you explain what Canadian Helium is?

A Canadian Helium is a small producer of helium in Saskatchawan owned by three companies jointly.

Q Which three companies?

A Gulf, Canadian Liquid Air, and British Oxygen.

Q Does Canadian purchase oxygen?

A Yes.

Q From whom?

A Canadian Liquid Air.

Q Does it purchase nitrogen?

A Yes.

Q From whom?

A The same source.

Q Does it purchase acetylene?

A Yes.

Q From whom?

A Canadian Liquid Air.

Q Your air separation plant in Toronto, does the serve the entire Canadian nation?

A No, only the immediate Toronto area.

Q Do you sell air separation gases throughout Canada or in some narrower part?

A Four provinces.

Q What are those provinces?

A British Columbia, Alberta, Ontario and Quebec.

Q Am I correct in inferring that all of the air separation gases you sell in British Columbia and Alberta you buy from competitors?

A That is correct.

MR. THURMAN: Objection, your Honor. He is leading the witness.

JUDGE BARNES: Yes, don't lead.

Q The air separation gases you sell in Quebec, where do they come from?

A Canadian Liquid Air.

Q Ontario, where do the gases come from?

A Our plant and purchases from Canadian Liquid Air.

Q Taking into account all of the gases which we have just been discussing, does Canadian Liquid Air produce as much gas as it buys from other sources?

A Does Canadian Liquid Air?

Q I'm sorry, CANOX.

A We buy more than we make.

Q Why is that?

A Because we don't have the capacity.

Q And is there some reason why you haven't built additional capacity?

A We are caught in a little bit in between a small plant and a big plant and the economics of building a plant that would satisfy our needs doesn't make sense. We haven't reached the load where we can justify a bigger plant.

Q By the way, who is your major competitor in Ontario in air gases?

A Canadian Liquid Air.

Q Do they have a plant within a 100-mile radius of your Toronto plant?

A 30 miles away.

Q Where is that, sir?

A Hamilton.

Q Do you know what the capacity of that plant is?

A 2100 tons.

Q Do you know of any plants in the world that are larger than that plant?

A Not to my knowledge.

Q Which plant is closer to the United States, the Canadian Liquid Air plant or the CANOX plant?

A The Liquid Air plant.

Q Do you purchase any gases produced at the Canadian Liquid Air plant at Hamilton?

A Yes.

Q Would you compare for the Court to production cost of air gases you make in Toronto with the price you pay Canadian Liquid Air in Hamilton?

A We pay Canadian Liquid Air 9 cents per hundred cubic feet and our production costs are 13 cents.

Q Has CANOX ever had any intention of selling industrial gases into the United States from Canada?

A No.

Q Now, what are CANOX's total sales of the gases that we mentioned earlier?

A Gas sales only?

Q Yes, in 1973.

A About $8 million.

Q Does Canox have any tonnage plants for any of these gases that we discussed?

A No.

Q Did you have occasion to have a meeting with a gentleman named Michael Loveman of Burdett Oxygen of Cleveland in October of 1973?

A Yes.

Q Where was that meeting?

A In Cleveland.

Q How did you come about to visit Cleveland for the purpose of having that meeting?

A I phoned Mr. Loveman early in September and asked if I could come down and visit with him.

Q Why did you do that?

A I heard rumors that Canadian Liquid Air was intending to buy out Burdett of Cleveland.

Q Of what significance was that to you?

A We also bought product from Burdett, nitrogen and oxygen, and we had an interest in his Niagara Falls plant, we always did, and number 3, they were a supplier of our safety equipment to the tune of about $45,000 a year.

Q Why were you interested in Burdett's Niagara Falls plant?

A So that we could have our own product rather than be in the hands of our competitors.

Q What did you intend to do with whatever product you would obtain in the event you bought the Niagra Falls plant of Burdett?

A We would bring the product back into Canada.

Q Now, has CANOX made effort to buy that plant or expressed interest in buying that plant in the past?

A Yes, we did.

Q I assume since you don't own it today Burdett rejected all of those efforts; is that correct?

A Yes.

MR. THURMAN: Still leading the witness. We haven't objected to a lot of these leading questions, we would like him to ask him the question why and not tell him why. They have great difficulty to convert from cross to direct, obviously.

JUDGE BARNES: Mr. Kaplan, you are leading the witness on some of these questions.

MR. KAPLAN: I will try and correct that, your Honor.

Q When you went to Cleveland to see Mr. Loveman, will you tell us what happened on your visit to Burdett Oxygen?

A I arrived at 9:30 in the morning, Mr. Loveman picked me up at the airport. We arrived at his offices and we had a tour of his offices with particular reference to his computer system and his accounting systems.

Following that I had a tour of his plant operations. After lunch I had a discussion with he and his financial man about personnel appraisals. Following that we had a brief discussion on incentive plans and we were alone for a few minutes and he drove me to the subway to catch the subway

out to the airport.

Q During the course of your visit to Burdett on that occasion, was there any discussion as to whether the Burdett Cleveland Company might be sold?

A Yes.

Q What part of the day did that take place in?

A Around three o'clock.

Q What was said during that discussion and by whom?

A I asked him if Liquid Air made an offer to buy him out. He said yes, but his company was not for sale. I asked him why not. He said his record of earnings was not the best in the past few years but perhaps four or five years down the road he could be interested.

Q Was anything else said on that subject during that conversation?

A I said to him, if you do decide to sell any part of your business or all of it, give me time to let me know before you did it.

Q Do you recall anything else being said during that part of the meeting?

A Not really, no.

Q Anything else being said on the subject of the sale of Burdett or any part of it throughout the day?

A No.

Q Did you at any time during your October 15, 1973

visit to Burdett tell Mr. Loveman that CANOX might like to become involved in the industrial gas business within the next five years?

MR. THURMAN: Objection, leading question. As leading as you can get.

MR. KAPLAN: Your Honor, if I may, I exhausted the witness' recollection of what was said and I believe I may bring the witness' attention to specific subjects at this point. And I am simply bringing his attention to what Mr. Loveman testified to in this courtroom.

MR. THURMAN: I don't believe that is the correct procedure.

MR. KAPLAN: I respectfully take issue with my friend Mr. Thurman.

JUDGE BARNES: I think that question is still leading the way it is phrased.

BY MR. KAPLAN:

Q Was there any discussion between you and Mr. Loveman with respect to the possibly entry in the industrial gases business in the United States by CANOX or British Oxygen?

A No.

Q Was there any discussion with Mr. Loveman on that occasion about whether Mr. Loveman would consider having Burdett becomes a unit of CANOX or British Oxygen?

A No.

MR. THURMAN: Objection. He already said what he remembers. He is still leading him, trying to tell him something else or not.

JUDGE BARNES: I think the question is proper.

Q Mr. Dow, at the time you went to see Mr. Loveman in Cleveland in October, 1973, did you have any authority either from CANOX or from British Oxygen to discuss with Mr. Loveman the possible acquisition of Burdett?

A None whatsoever.

Q And did you have any instructions to discuss those subjects with him?

A No, I did not.

Q Now, put yourself back in time to October 15, 1973.

At that time had you heard anything about BOC's possible acquisition of an interest in Airco?

A Yes.

Q What was the state of your knowledge at that time?

A I just knew that they had had a preliminary meeting and I was informed of that somewhere in August.

Q Now, following the meeting with Mr. Loveman, you in fact had some further communication with him?

A Yes. I wrote him back and sent him some appraisal forms. He asked if he could send a couple of his medical people up to visit our medical people to learn what sort of products and how we were merchandising medical equipment in

Canada.

MR. KAPLAN: I think I have no further questions, your Honor.

JUDGE BARNES: You do sell medical products in Canada, Mr. Dow?

THE WITNESS: Yes, through Medishield.

CROSS EXAMINATION

BY MR. THURMAN:

Q Mr. Dow, what is the size of the Burdett of Cleveland Niagara Falls plant?

A It is a tonnage plant.

Q How much?

A I don't know.

Q You don't know the capacity?

A I can't recall.

JUDGE BARNES: Do you have an idea how large it is, Mr. Dow?

THE WITNESS: It would be between 200 and 400 tons, somewhere of that order.

Q What's that, ten to twenty times the size of your present plnt?

A That's exactly right.

Q And you couldn't build a plant because you didn't have usage for a larger plant?

A That's correct.

Q Then why did you want to buy that plant?

A Well, we could take the product from that and shut down our own plant. Then we can play tunes between two plants.

Q You had a 20-ton plant, you are going to shut down and supply a 20-ton customer with a 400 tonnage plant?

A No. But all of that tonnage does not come as liquid. That is supplying Hooker Chemical. The liquid make is nowhere near 400 tons. I think it is of the order of 100 tons. I can't be precise.

Q Or 200?

A I don't know.

Q You don't know. Considerably larger than your present plant?

A That's correct.

Q And you are going to use that to supply your present plant output, customers who are receiving output from your present plant?

A We would use that to supply, yes, shut down our current plant and supply our customers, because we are buying in more product even where our plant is located than we are making.

Q Why couldn't you build one?

A Because, again, our sales of liquid in the Toronto area is only in the order of 35 tons.

Q I believe you testified you were going to ship this

200 tons of liquid from Niagara to Toronto. What were you going to do with it?

MR. KAPLAN: Objection. The witness didn't say there was 200 tons of liquid at Niagara.

MR. THURMAN: He didn't know. Somewhere between 200 and 400 tons.

THE WITNESS: Would you repeat the question, please?

JUDGE BARNES: Rephrase the question, Mr. Thurman.

Q I believe you testified you are going to ship product, all the output from Niagara Falls up to Canada?

A No, not all the output. Only the liquid output.

Q I refer you to Commission Exhibit 244-B, and to refresh your memory if needed, I refer you to it and would you read to yourself the third paragraph.

A Yes (complying).

Q Does that refresh your memory as to what size the liquifier was?

A No. That says Joliet. That has nothing to do with Niagara Falls.

Q I apologize. I believe you are right, Mr. Down.

What were you going to do with the present customers of the Niagara Falls plant?

A We would not worry about them.

Q You would not continue supplying --

A U.S. customers?

Q Yes.

A No. We had the need for the liquid in Canada.

Q Do you know what the import duties into Canada are?

A Yes, 15 percent.

Q And what the export duty is?

A Yes, 5 percent.

Q I believe you testified that you had no instructions to go down there. As chief operating officer, do you need instructions?

MR. KAPLAN: Objection, your Honor. Mr. Thurman is mischaracterizing the testimony given. He said he had no instructions to discuss the acquisition of Burdett.

MR. THURMAN: I think to bring up rules of evidence in cross examination, you can mischaracterize the evidence.

He has a right. He can correct it. I don't intentionally do it. But I don't know anything wrong with that.

MR. KAPLAN: Your Honor, I think in the interest of candor and fairness to the witness, there ought not to be any mischaracterization, deliberate of otherwise.

JUDGE BARNES: No, not intentional. But if Mr. Thurman asks a question that mischaracterizes his testimony, the witness should pick it up.

All right. Can you state your question again?

BY MR. THURMAN:

Q I believe you testified that you didn't have any

instructions when you made this trip down to talk about acquisition.

Do you need -- as chief operating officer of BOC subsidiary, do you need instructions to go talk to somebody?

A I would need instructions if I was going to talk about acquisition. I did not go down to talk about acquisition.

Q What did you go down there for?

A I went down there for market intelligence.

Q Do competitors normally give our market intelligence?

A Certainly.

Q To other competitors?

A I think everybody is on the lookout for market intelligence. And if our biggest competitor in Canada is going to buy Burdett, then I want to know whether it is true or not.

JUDGE BARNES: If it were true, you were interested in making a bid?

THE WITNESS: No, no. I didn't say that. But we would have to perhaps look for another source of supply for goggles and the hard goods we buy from them, and it would also cut off another source of buying liquid oxygen when we can't get it from Liquid Air.

JUDGE BARNES: You had a real continuing relationship with Liquid Air in Canada; now, what, did you feel that relationship would stop if they bought Burdett?

THE WITNESS: No. We had entered into a relationship with Liquid Air in Canada. But I think Mr. Giordano said they can no longer satisfy their own requirements, used up their own capacity, then we are cut off from Liquid Air. They want to satisfy their customers first. So we always try and have alternate sources of liquid oxygen, and Burdett was one.

BY MR. THURMAN:

Q It appeared to me you were in bed with Liquid Air. All your purchases were from Liquid Air. Now you say, have you been cut off?

A No, we haven't. But from time to time we do cut off. As recently as two weeks ago we had to go down to Burdett and pick up two or three loads.

Q If they had the excess capacity from Burdett, just because -- the change of ownership whom you had been dealing with, what would give you the idea they would cut you off down there?

A I didn't say they would cut us off. But it would be nice to be independent of a competitor. In other words, we are in the competitor's hip pocket in Canada.

Q Did you anticipate Liquid Air selling all their capacity in Canada?

A Selling out all their capacity?

Q In Canada.

A We never know when that may take place.

Q What would be the dollar sales value of the capacity of the Niagara Falls plant

A I have no idea.

Q You don't know whether you could use it all up in your place or not; is that correct?

A We think we could.

Q How far could you ship that?

A Not too far.

Q How far --

A Just the interior market. About 200, 250 miles.

Q What kind of sales do you have in that 250-mile radius?

A Oh, in the order of 35 tons a day.

Q So you were going to quit, if you acquired the plant, you would have --

A We would satisfy -- obviously, if you have surplus liquid you would sell it. We would satisfy our own customers in Canada first, and sell the balance in the States until we had built load in Canada.

Q How long would it take you to build a load in Canada, do you know?

A I really can't tell you. We have projections, but it depends on the economic growth in Canada and the industrial growth.

Q And you anticipated continual growth?

A We anticipate a 10 to 15 percent growth per annum.

Q Turning to medical products, I believe you testified CANOX sold medical equipment. Would you specify what medical equipment it sold?

MR. KAPLAN: Objection, your Honor. We are beyond the scope of direct. There wasn't a single question about medical equipment.

JUDGE BARNES: Didn't I ask him a question about medical equipment?

MR. THURMAN: Yes.

JUDGE BARNES: I asked a question.

A CANOX used to sell medical products. Now it is sold by Medishield.

Q What products were sold prior to Medishield taking over the medical products of CANOX?

A Fundamentally anesthesia equipment and inhalation therapy equipment.

Q Do you know what percentage of the Canadian market CANOX had of anesthesia equipment?

A No, I can't recall those figures.

Q Do you know what share of the Canadian market CANOX had of the inhalation therapy equipment?

A No.

JUDGE BARNES: Medishield operates the medical products sales i n Canada apart from CANOX?

THE WITNESS: Yes.

JUDGE BARNES: It is a separate --

THE WITNESS: It is a separate entity. I have no jurisdiction over it at all.

MR. THURMAN: We have no further questions, your Honor.

MR. KAPLAN: Just one or two.

REDIRECT EXAMINATION

BY MR. KAPLAN:

Q Mr. Thurman referred to the import duty on importation of gas into Canada a moment ago.

A Yes.

Q Was it your beliefent the time you considered or at least desired the purchase of Niagara Falls plant --

JUDGE BARNES: Let's not make this a leading question.

MR. KAPLAN: I'm not about to. I am going to ask him whether it was one thing or the other out of two possibilities.

JUDGE BARNES: Can't you phrase it differently than that?

MR. KAPLAN: Well, let me take a try at it.

Q Did you have any belief as to whether or not you could import gas from the Niagara Falls Burdett plant if you bought it, into Canada economically or not?

A When we bought it, we buy it at seven cents. And if you had 15 percent duty to that, we have -- it doesn't add up to a great deal of money. And that's considerably lower than our production costs of 13 cents.

JUDGE BARNES: You buy it from Burdett at that price?

THE WITNESS: That's what they bill us for, have billed us in the past.

MR. KAPLAN: No further questions, your Honor.

RECROSS EXAMINATION

BY MR. THURMAN:

Q What was this 9-cent figure you testified to?

A That we buy from Canadian Liquid Air in Hamilton at nine cents.

Q Canadian Liquid Air. How much have you bought at seven cents?

A I can't tell you exactly. Those are spot loads that we buy when we run short and we can't get it anywhere else.

Q How long has Canox owned this plant that you own? How long have you owned the plant which you operate?

A I have to stop and think. We only installed this plant about, I'll guess, six or seven years ago. This replaced two much smaller plants called hundred-meter plants.

Now, a 600 meter plant is essentially a 20-ton plant. Prior to that we had two very old 100-meter plants.

Q Why did you replace these two smaller plants with such an uneconomical plant?

A Because we didn't have the load. You have to run these things at about 75 percent.

Q Well, how much were you buying at that time from Liquid Air?

A When we put in the 20-ton plant?

Q Yes.

A We were buying very little, practically none.

Q You were only using your own production at that time?

A Correct.

JUDGE BARNES: You speak about a 100-meter plant, Mr. Dow, and a 600-meter plant.

Do these plants come in graduated sizes?

THE WITNESS: Yes.

JUDGE BARNES: Or do you have to go from one size to another larger size?

THE WITNESS: They come in graduated sizes. You would go from a 20-ton and probably the next step would be a 50-ton and then a 100-ton. But you don't get really economical on your gas until you get up to 100 tons or better. Your production costs are too high.

JUDGE BARNES: Wouldn't there be anything such as a 60-ton plant or 40-ton plant?

THE WITNESS: Not that I know of.

JUDGE BARNES: You to to 50 tons?

THE WITNESS: You go to 50 and 100, and then you go up in increments of 100.

BY MR. THURMAN:

Q I assume, getting back to saying that you are going to import all the output of the Niagara Falls plant had you

acquired it, you are not talking about the tonnage part, are you?

A Oh, no. Tonnage is gas. We would bring in the liquid that we required.

Q You would contine the gas to the U.S. customers?

A Oh, I think you'd have to. You'd have to buy up the contract.

Q This is a matter of curiosity. I dont know.

Why would you continue to operate a plant that costs you 13 cents when you could buy it for nine or seven cents?

A Well, because you can't always get all you want. So we must maintain some semblance of independence. We will put up a bigger plant ultimately somewhere down the road when we can justify it and have enough across the country from Liquid Air. We purchase all our requirements in British Columbia and Alberta, and all our requirements in the province of Quebec.

We purchase some liquid in Ontario.

Q Ontario is where your plant is located

A That's correct.

Q What percentage do you purchase compared with what you produce?

A Oh, we purchase -- just in the Toronto area?

Q Yes, where you produce.

A Where we produce, we would purchase about 10 tons a day.

Q And what percentage would that be of your use?

A It would be 50 percent of what we produce. We produce 20 tons.

MR. THURMAN: No further questions.

FURTHER REDIRECT EXAMINATION

BY MR. KAPLAN:

Q What size plant, if you know, would CANOX have to build to produce at a price competitive with a production cost that Canadian Liquid Air has at Hamilton?

A Something in the order of five or six hundred tons.

MR. KAPLAN: No further questions.

BY MR. THURMAN:

Q What size plant would you have to produce in other areas where you purchase rather than manufacture?

A I don't understand the question.

Q Well, I understand in some areas in Canada you have 100 percent. You don't produce?

A Right.

Q What size plant would you have to build in those areas to compete effectively?

A I don't think they make them that small. I really don't.

Q You have two extremely small plants to start there anyway?

A That's right.

JUDGE BARNES: Mr. Dow, if you had purchased the Niagara

falls plant, and Burdett had a good customer that they had been serving, say in Niagara, would you have continued serving that customer?

A We would have brought whatever liquid we needed into Canada. And if we couldn't serve that American customer, we wouldn't continue to serve that customer. Our obligation is to serve the Canadian market.

BY MR. THURMAN:

Q Even if you could have sold it more profitably in the United States?

A I don't think you could sell it more profitably. That's a matter of judgment.

Q Even if you could?

A I don't know what the price structure is down there, so I couldn't comment on it.

Q You certainly wouldn't transport across into Canada if you could make a better profit in the Niagara Falls area; is that right?

A We'd take a look at it, for sure, if there was that much difference. I don't think there probably is.

MR. THURMAN: Nothing further.

JUDGE BARNES: Any more questions?

MR. KAPLAN: No further questions.

JUDGE BARNES: Thank you, Mr. Down.

(Witness excused.)

MR. TOPKIS: Your Honor, we have another witness who will be about as brief, possibly even briefer than Mr. Dow. Would your Honor like to have him on now or would you like to recess for lunch?

He is from out of town, I might say.

MR. THURMAN: It's up to your Honor. If you ask me for a choice, It doesn't make any difference, if that helps you.

JUDGE BARNES: Off the record.

(Discussion off the record.)

JUDGE BARNES: We will recess for an hour and be back at a quarter of two.

(Luncheon recess, 12:40 p.m.)

AFTERNOON SESSION 1:45 p.m.

JUDGE BARNES: On the record.

ALBERT W. KARNATH

called as a witness on behalf of Respondent British Oxygen Company, Ltd., was duly sworn and testified as follows:

JUDGE BARNES: State your full name, please.

THE WITNESS: Albert W. Karnath.

DIRECT EXAMINATION

BY MR. KAPLAN:

Q By whom are you employed, sir?

A Arthur D. Little Company in Cambridge, Massachusetts.

Q What is the Arthur D. Little Company's business?

A We are consulting company, engineering and business consulting.

Q And for whom did you consult in general terms?

A General terms, for public and private clients throughout the world.

Q And what is your position with Arthur D. Little?

A I'm a senior consultant, I think what we call the resources section.

Q How long have you been with that firm?

A I've been with them almost 14 years.

Q I believe that you received a bachelor of arts and bachelor of science degree in chemical engineering from Notre Dame in 1956; is that correct?

A Yes.

Q And you received a master of science in chemical engineering from MIT; is that correct?

A That's correct.

Q That was in 1959?

A That's right.

Q And you've attended the University of Chicago Graduate School of Business; is that correct?

A That's correct.

Q Now, prior to your employment with Arthur D. Little, you were employed in the engineering department of Inland Steel Company; is that correct?

A That's correct, yes.

Q And also with the Rierson Division of Inland Steel Warehouse Division?

A Yes.

Q What were your duties there?

A Well, I was in the engineering. We were doing basically engineering studies on steel processes and for the subsidiaries, and with Rierson it was what you call sales development.

Q And you've worked for Air Products and Chemicals; is that correct.

A Yes.

Q And when was that?

A That was in '60.

Q And what was your function there?

A This was in a department which you might call corporate planning for diversification studies.

Q For what part of Air Products' business?

A Well, at that time we were looking very seriously to enter the chemical business.

Q Did you have any functions at Air Products related to industrial gas?

A Not directly, no.

Q Now, in, say, the last ten years, with Arthur D. Little, have you had some experience in connection with the industrial gas industry?

A Yes, we performed several studies, many of which I've directed. Going backwards, in this year we did an acquisition study for a foreign company who was looking to buy a U.S. industrial gas company.

MR. KAPLAN: Before we go any further, I recognize that this is rather a sensitive matter, your Honor. And that the identities of the companies involved are proprietary, and so forth. And I'd like to ask Mr. Karnath to identify his client and the subject of his study, but to do it by writing it on a piece of paper which will be treated as an in camera exhibit.

JUDGE BARNES: I take it this study might have some

force and effect?

THE WITNESS: It is quite recent, your Honor, and we agreed with the company, with the client, that we would not reveal their interst in the situation. I think we would be doing a disserviee, frankly, if we made it a public piece of information.

JUDGE BARNES: All right. Any objection, Mr. Thurman?

MR. THURMAN: If this has some relevance in this case, then we would object to it because we don't know any way we can cross-examine him about that study or the client, or what they are going to do.

JUDGE BARNES: Are you going to offer the study in evidence?

MR. KAPLAN: No, your Honor. As a matter of fact, we are not going to examine with respect to the study at all. The only reason we want the information is to identify the identities of the companies involved.

JUDGE BARNES: This might be difficult on cross-examination, but if it is the only way we can proceed --

MR. THURMAN: It is -- he is certainly going to have to describe what he did and all this as to whether he is an expert, I don't know how he can do that without describing the companies involved and all about what he did for them, whether he recommended and such.

JUDGE BARNES: Well, we will have to proceed from here.

It appears to have some relevance, if it is a foreign company looking into entering into the U.S. market. So I will permit Mr. Karnath to write the name of the foreign company and the name of the company which you examined for them, I take it.

THE WITNESS: Yes.

MR. THURMAN: Also, we have an objection because they refused to give us any of these type of studies, studies and such things. They have given us one study, Arthur D. Little study, and that's it. So they should be foreclosed from even bringing anything else out. We haven't had an opportunity to look at this study.

MR. KAPLAN: Your Honor, we may have no intention whatsoever of offering the study.

MR. THURMAN: Why bring it up?

MR. KAPLAN: You know, Mr. Thurman, did get Mr. Pullam on the stand and asked Mr. Pullam who he thought was interested in coming to this market. We didn't have Union Carbide's secret planning documents. The same question was asked of every witness the government called. We had none of their internal planning documents, although the government has them as a result of the industrial gas investigation.

Now, we are not offering this material to do anything but to prove that someone thought enough of the possibility of entry to hire Arthur D. Little to look at it.

JUDGE BARNES: We will have to give this a number.

MR. KAPLAN: Yes. Why don't we number it BOC RX-240?

MR. SILVERMAN: 235.

MR. KAPLAN: 235.

I offer it in evidence, your Honor.

MR. THURMAN: I thought he was on the qualification stage. Why is he offering something into evidence?

MR. KAPLAN: It seems to be evidence.

MR. THURMAN: This has nothing to do, and there is no correlation between what Mr. Kaplan is trying to say that we asked what they considered in their mind and what a man actually did.

If he is going to testify that he did something like this, we want to see that study. And we want to put it in this record.

MR. KAPLAN: I think we could drop the whole line of inquiry if the government will concede that the issue of who was the most likely potential entrant has nothing to do with this case.

JUDGE BARNES: This is certainly an element and I think it is relevant. And I am going to strike the words "wish to acquire."

This may be a little self-serving.

MR. KAPLAN: Is there some other way to put it?

I just want it to be clear which was which.

JUDGE BARNES: Let's say prospective acquiree and

prospective acquiror.

All right. I will receive in evidence in camera BOC RX-235, in camera.

(Exhibit BOC RX-235 marked for identification and received in evidence.)

MR. THURMAN: At this time, your Honor, we move that we be furnished a copy of this study, or we will subpoena it. We prefer it to be given to us now. If not, we will put you on notice we are going to subpoena the study.

JUDGE BARNES: Let's first establish where the study was prepared and things like that.

MR. THURMAN: On voir dire?

JUDGE BARNES: Well, sometime in the examination you could do that.

I would like to ask you a question.

Does the American company, is the American company aware of this interest?

THE WITNESS: I suspect they may be. We didn't make them aware but my guess is, it is strictly a guess, that they would be. But I think it would still be embarrassing to them to have that part revealed. I have no reason to protect them, but it just seems to be the decent thing to do.

JUDGE BARNES: All right.

Mr. Kaplan, you may proceed.

BY MR. KAPLAN:

Q Mr. Karnath, have you managed other studies connected to the industrial gas industry the last ten years?

A Yes. We did a study for U.S. Steel which I believe everybody is aware of. We did a study -- and here I can, because of age, identify clients--for FMC, who was interested in acquiring Chemetron at that time. This was about 1968.

We did a study for the group which was interested in putting up a plant in Virginia based on a major company there. We did the acquisition study when Houston Natural Gas acquired Liquid Carbonics in about '69, I believe.

JUDGE BARNES: You said the group or a group. What was that?

THE WITNESS: This was a group that was--this was, half of the group was represented by National Welding Supply, the other half was by Burdett. They would--they were putting, for them, a fairly major plant in Virginia.

JUDGE BARNES: That plant was constructed, I believe?

THE WITNESS: Yes. The purpose of that was to obtain financing, for example.

MR. THURMAN: Your Honor, the witness is referring to "we." We think it should be referred to as "I," what "we" did.

THE WITNESS: In those studies referred to, I was what you call the case leader. I had the responsibility for the preparation of the proposal, the contact with the client,

the supervision of the job, meeting the budget, and so forth.

Now, the "we" refers to the fact that we work as a team. And of course I had many colleagues that worked with me on these things. We had engineers, for example, that examined plants that I'm not capable of doing, to the extent they are. So this is the "we" and the "I."

BY MR. KAPLAN:

Q You mentioned a company named FMC. What line of business are they in?

A A huge company in a great many lines of businesses from chemicals to machinery. The original name was Food Machinery Company, that's the FMC, and they do make canning equipment, they make chemicals. They are a diversified company.

Q Mr. Karnath --

MR. THURMAN: I am really confused here. We were told he was going to testify about one study and they furnished the study. Now he is talking about everything else and he hasn't been qualified as an expert yet and they are going into substance. I don't know if he is qualified to be talking about this business.

JUDGE BARNES: I don't think he went too much into substance yet. I haven't heard any attempt to offer any studies in evidence or anything of that nature.

Now, the fact that he's made a study is proper, to know that. But what does it prove until they get into the studies?

At that point you may have an objection.

MR. KAPLAN: Thank you, your Honor.

BY MR. KAPLAN:

Q Mr. Karnath, you have been retained by us to testify in this case; is that correct?

A That is correct.

Q And you've been retained under circumstances whereby we pay your normal daily rate for testifying; is that right?

A That's right.

Q And how much is that, sir?

A That's about $900 a day.

Q Now, you mentioned a few moments ago that you prepared a study for the United States Steel Company?

A That's right.

Q Now, I show you BOC Respondent's Exhibit 58, and ask you if that's the study to which you referred.

A This is the study. It's a Xerox copy of it, obviously. It seems to be the same length.

MR. KAPLAN: Your Honor, we offer in evidence BOC Respondent's Exhibit 58.

JUDGE BARNES: Do you have any objection, Mr. Thurman?

MR. THURMAN: Yes, your Honor. I object. There is no foundation to the reliability of this study. There is no foundation laid as to what this witness did concerning this study. There is no foundation as to where the hearsay

evidence, how it was arrived at. There is no backup on these figures or anything in this study. We got the study, period.

JUDGE BARNES: I think we should have quite a few foundation questions here as to when it was prepared, what part the witness played in preparing it, and then the purpose of the offer, what it is offered to prove.

MR. KAPLAN: Fine, your Honor.

BY MR. KAPLAN:

Q Who was the project or case leader of the study which is Exhibit 58?

A I was the project leader.

Q And when was that study done, sir?

A May I look at -- I believe the date when the report was issued?

It was issued in September of '68. The study was actually prepared inthe spring, up through May and June.

JUDGE BARNES: And was the study prepared at the request of someone?

THE WITNESS: Yes. It was done under contract for the U.S. Steel Company.

Q Did U.S. Steel retain Arthur D. Little to do this study?

A Yes, they did.

Q And what were the circumstaces, as far as you were aware of them, that resulted inthe study being commissioned?

MR. THURMAN: Objection. It's hearsay.

JUDGE BARNES: I think he can testify what he was commissioned to do.

And that would be, what were you commissioned to do?

THE WITNESS: Well, we were commissioned by U.S. Steel to see if the situation that existed for them gave an opportunity to diversity the company business into the industrial gas field.

JUDGE BARNES: Was this limited to any area?

THE WITNESS: Yes. It was done inthe Lorraine, Ohio and Pittsburg, Pennsylvania regions because that's where plants would be constructed by the company.

MR. THURMAN: Objection. We move it be stricken unless the foundation, he negotiated -- he keeps referring to "we."

"We" is not this witness. If he is in negotiation with it, and they told him what he was going to do this for, then we have no objection to that. But what somebody else told him it was for, then we would object.

BY MR. KAPLAN:

Q Mr. Karnath, did U.S. Steel tell you why they wanted this study done?

A Yes, they did.

Q What did they tell you?

JUDGE BARNES: I think it would be more proper to ask him what was the purpose of your study as far as U.S.

Steel Corporation was concerned?

THE WITNESS: Well, that was, the purpose of it was to study the feasibility of entering the merchant industrial gas business in these particular two regions that they had selected.

JUDGE BARNES: All right.

MR. KAPLAN: Your Honor, I renew my offer of BOC Exhibit 58 for the purpose of showing that the United States Steel Corporation commissioned such a study and retained Arthur G. Little to do it.

JUDGE BARNES: And this is the study that they --

MR. KAPLAN: And this is the study which they did. I believe the witness so testified.

MR. THURMAN: Your Honor, we will stipulate that a study was made and Arthur D. Little did it, but I object to the study being introduced itself as hearsay and without -- and no degree of reliability, how it wasput together, what materials were used, and just exactly what's in that study.

The stipulation is, for the purpose he wants the study, we will stipulate that the study was made, for the purpose as the witness testified.

JUDGE BARNES: Well, I think it is appropriate to have the study in to show what recommendation this witness made to U.S. Steel. It's not being offered for the truth of the material in here, and that is only one opinion. It is the

opinion by the witness, and it is proper to be received, in my opinion.

MR. KAPLAN: Your Honor, I do offer the exhibit in camera and I do so at the request of the United States Steel Corporation.

MR. THURMAN: We don't see any in camera treatment in something we don't even know is reliable.

This thing is a '68 -- everything in this record they want in camera. This is a '68 document. Here it is 1974.

JUDGE BARNES: You made your point. It is a 1968 document. It is some five years old now and I see no point in placing this exhibit in camera,either.

The Commission has now instructed that we put a date on in camera documents by which date the exhibits will come out of in camera, and it is usually a three to five years period. So a five-year period has already run on this study. So I will not receive it in camera.

MR. KAPLAN: I have no problem with that myself, your Honor, but I would ask this, inasmuch as I made the request for in camera treatment, the request of U.S. Steel, I would ask that the exhibit be held in camera for 60 days, during which time U.S. Steel would seek, if they wish, further in camera treatment and justify it if they can.

JUDGE BARNES: I won't do it that long. It will be received in camera for 30 days from today.

MR. KAPLAN: Thank you.

JUDGE BARNES: Do you have another objection before I receive it, Mr. Thurman?

MR. THURMAN: I'm not sure what it is being received for and I want to get clear in my own mind and for the record, I guess, whether this is just received that a study was made and not for the truth of the matter.

JUDGE BARNES: Not for the truth of the matter, but this is a study of the recommendation that was made to U.S. Steel. And I will receive BOC RX Exhibit 58-A through 58 -Z81. I'm going to receive it in camera for 30 days, during which time U.S. Steel may make a motion for further in camera treatment if they so desire.

(Respondent BOC Exhibit 58-A through 58-Z81 received in evidence in camera.)

BY MR. KAPLAN:

Q How did you and your associates at Arthur D. Little go about obtaining information in connection with this study in the market areas concerned?

A In the market areas we talked with a very high percentage of the customers of industrial gases directly, some by telephone, mostly by personal visits.

Q And did you have any contacts with anyone in the industrial gas business other than customers?

A No, we didn't, as our practice, we didn't talk to

potential competitors.

Q I see. Now, in making your field contacts in connection with this study, was the identify of your client divulged or concealed?

A In general, as I recall, it was divulged. We certainly divulged the fact that it was a steel company because there was a necessity -- these pieces of data we had to get.

Q I see. Now, I would like to clear up simply one or two ambiguities in the language in the study.

If you would turn to page 6 of the study before you, Exhibit 58, I invite your attention to the second sentence of the second paragraph.

MR. THURMAN: Your Honor, no relevancy whatsoever to this document as far as the truth is concerned, it is not entered for the truth of the matter, so there is no relevancy to this document as far as what is in it. We certainly should not waste the time to go in and discuss this document.

JUDGE BARNES: I don't think we should make any corrections in the document unless they were made to U.S. Steel at or about the time the report was admitted.

MR. KAPLAN: I was not going into any corrections at all, your Honor. I'm not going to detract from what is printed here.

BY MR. KAPLAN:

Q I invite your attention to the second sentence of the

second paragraph. Do you see that?

A Yes.

Q And the portion of the sentence that says, "It is our conclusion, however, that only the four largest suppliers for this market" et cetera, and the rest of the sentence. Do you have that sentence in mind?

A Yes.

Q Who were the four suppliers you referred to there?

MR. THURMAN: Objection. He didn't even talk to any of these people, any suppliers that he is referring to. And he's got to produce material to show how they arrived at that conclusion. Certainly out of the blue now -- he said this was not entered for the truth of the matter. And now he is trying to go farther and let him testify to everything.

JUDGE BARNES: No. He is identifying who the four largest suppliers are that he is referring to in that sentence.

I would take -- are they explained anywhere else in the document?

THE WITNESS: There is some data on market share and so forth, as we found in the study.

JUDGE BARNES: All right. You may tell me who the four largest suppliers were that you were referring to in that sentence.

THE WITNESS: Well, as I recall, it was the Linde

Division of UCC, Airco, Air Products, and Chemetron.

BY MR. KAPLAN:

Q Now, turning over to page 29, Mr. Karnath, do you have that?

A Yes.

Q You reported to U.S. Steel that Mingo Oxygen was the supplier of gaseous oxygen to major steel-making facilities.

Do you happen to know who owns Mingo Oxygen?

A I think at that time Wheeling Steel had a big interest in it. I don't know if they own the whole thing or not.

Q Do you know whether they own it or not today, to anticipate Mr. Thurman's concern?

MR. THURMAN: What is the relevancy of this? I'm objecting.

MR. KAPLAN: Your Honor, I think the relevance of Wheeling Steel owning an oxygen producer is of obvious relevance to this case.

A I've heard nothing that the ownership --

JUDGE BARNES: Wait a minute.

Well, I would like to know -- I haven't heard the name Mingo before, and I would like to know who Mingo was for the clarification of the record.

It is partially owned by Wheeling Steel?

THE WITNESS: To my knowledge.

May I answer -- do you wish me to answer it today, the

other part of the question?

JUDGE BARNES: Yes.

MR. THURMAN: What's his knowledge, first.

THE WITNESS: All I can say is I know of no change.

BY MR. KAPLAN:

Q Where did you learn that Mingo Oxygen was owned by Wheeling Steel, if you can recall?

A This was a long time ago when it was set up, I don't remember, in the late '50's or early '60's, it was discussed in the press. I don't think it is a secret.

MR. KAPLAN: Your Honor, as long as the document is in evidence, I would simply like to invite your Honor's attention to two items in it.

First of all, on page 1, the first paragraph, and secondly all of page 6.

MR. THURMAN: No, obviously Mr. Kaplan didn't listen twice when he said what this was in evidence for, not for the truth of the matter. So why point out anything in the document?

JUDGE BARNES: Well, I'm not reading it for the truth of the matter. I'm reading to see what was reported to U.S. Steel.

You said which paragraph on page 1?

MR. KAPLAN: The very first paragraph, your Honor.

MR. THURMAN: I would like to clear the record for

your Honor. Mr. Kaplan said now that this is in evidence. I'm sure it is going to be cited as something in evidence. Certainly at this time we point out this cannot be cited as in evidence.

JUDGE BARNES: Well, it is received in evidence, that is correct.

MR. KAPLAN: And page 6, your Honor, if you would.

JUDGE BARNES: You may proceed.

MR. KAPLAN: I have no further questions.

JUDGE BARNES: Let me ask you one question, Mr. Karnath, while we are waiting here.

This is a study that -- or this report, this inquiry, whatever it was you made for the foreign steel producer --

THE WITNESS: Yes?

JUDGE BARNES: I mean foreign gases producer, I guess it is, when did they first contact you in regard to this study?

THE WITNESS: It was the end of February or early March, around there, of this year.

JUDGE BARNES: Of this year?

THE WITNESS: Yes.

MR. THURMAN: I didn't hear your Honor's question and the answer. Is that on the record?

JUDGE BARNES: Off the record.

(Discussion off the record.)

(Record read.)

CROSS EXAMINATION

BY MR. THURMAN:

Q Mr. Karnath, have we previously talked to you concerning this case, or your testimony?

A I believe you telephoned me, as I remember.

Q Have we talked about what you were going to testify?

A Pardon?

Q Did we talk about what you were going to testify?

A Only in general terms, as I recall.

Q Then you refused to talk with me without counsel being present?

A Yes. I asked that counsel be present. That is correct.

Q Have you been present during any of the taking of the testimony in this trial?

A You mean previous hearings?

Q Yes.

A No, this is my first day.

Q Have you read any of the transcripts?

A No. I've read no transcripts.

Q Now, turning your attention to this recent study that you testified to on direct, what countries does this client operate in?

MR. KAPLAN: Your Honor --

JUDGE BARNES: I don't believe that this would necessarily

disclose the name of the company, what countries, not necessarily where they are headquartered, what countries.

MR. KAPLAN: Your Honor, I think in this case it would, and I have no objection to the witness answering in camera on a slip of paper.

THE WITNESS: It would exactly identify.

MR. KAPLAN: Precisely.

THE WITNESS: Precisely pinpoint the company, because in one of the markets they have 100 percent of it, and that's all you need.

BY MR. THURMAN:

Q Rather than what country does this company operate in, what continent does that company operate in?

A European.

Q Only in Europe?

A Not only in Europe, but you describe it as a European company.

Q Does it operate in other continents?

A Yes.

Q In what continents are those?

A I'm not certain. It may be just about all of them. I know it is active in South America and in Asia.

Q Active in the United States?

A No.

Q How does this client compare with BOC as far as sales

in industrial gas?

MR. KAPLAN: Your Honor, once again, no objection to the substance. But we are in an area where this could lead easily to the identity of the company.

BY MR. THURMAN:

Q How does it compare in financial resources with BOC?

MR. KAPLAN: Same objection, your Honor.

Q Is it smaller, is it larger than BOC?

JUDGE BARNES: Now, we may have an objection, Mr. Thurman.

If you want the question answered, we'll have him write it on a piece of paper and receive it in camera.

MR. THURMAN: Well, your Honor, at this point I would prefer that the cross examination of this witness be deferred until we have been furnished a copy of the study made, where we can properly conduct cross examination on this witness.

The purpose obviously is that this client was a potential entrant. And we would want to know, make complete comparisons with this client and BOC, where one sits on the edge of the market, and whether they are on the brink or not. And what precipitated this study. Was it the entrance of BOC in the United States market? And this is a wealth of information we want to get out of this witness concerning this surprise study that he testified to on direct examination.

JUDGE BARNES: Mr. Kaplan, I'm sort of inclined to agree with Mr. Thurman here, if you are bringing this up as showing that there is another potential entrant. He is going to need to have quite a bit of information.

MR. KAPLAN: Well, your Honor, certainly no more than we have on U.S. Steel. Certainly, the name of the company, without mentioning it, has not been mentioned for the first time by this witness. We have witnesses in this trial who have testified, that is, witnesses from American gas companies, to acquisition discussions with this potential entrant.

We have had this company identified as far ago as the investigational hearings conducted by complainant counsel before the issuance of a complaint in this case, as a potential entrant.

So the name of this company is certainly no surprise. In fact, BOC produced what must be at least two or three thousand documents dealing with a bid involving this company on the Liquid Carbonic offering some years ago.

Certainly then the name of the company was no surprise.

Furthermore, we are offering it obviously to show that this other company is a potential entrant. But we offer it for no more, for no purpose other than the fact that the company was interested enough in the U.S. market to commission a study.

Beyond that, it seems to me, the production of the study will yield nothing. Whether this consulting firm recommended for or against is of absolutely no relevance.

The simple fact is that if a South African chemical company had commissioned such a study, that fact alone would be relevant as to who is more likely to enter it.

I don't think there is any purpose to be served.

JUDGE BARNES: Let's assume for the moment that Mr. Karnath recommended against entry and pointed out reasons why this particular company should not enter. Would that not indicate that they were not a potential entrant or not as potential an entrant as BOC?

MR. KAPLAN: Well, your Honor, perhaps so. And I'm quite confident, having discussed that particular question with the witness, that that issue can be disposed of here this afternoon, if the proper questions are asked, and for that matter I would be willing to ask them.

MR. THURMAN: Of course, we are at complete odds with Mr. Kapaln in that what he is saying as far as what they would perceive as a potential entrant, the testimony in this case is mostly developed on cross that they were not likely, they would not as likely be a potential entrant as Linde of Germany and Messer --

JUDGE BARNES: This is --

MR. THURMAN: This is not confidential.

JUDGE BARNES: Yes, it is.

MR. THURMAN: It is?

JUDGE BARNES: Let's not stop eliminating.

MR. THURMAN: We would like to know when this was commissioned.

JUDGE BARNES: I asked him that question and he answered it.

MR. THURMAN: The purpose of it, was it because BOC entered the market?

JUDGE BARNES: You can ask him those questions on cross examination. That's the purpose of cross examination.

MR. THURMAN: We would like to see this study. We don't really know what to ask too much, except some of the questions I'm asking.

Maybe this was a study to see whether they wanted to have a joint venture.

JUDGE BARNES: You can ask him what his instructions were and things of that nature.

MR. THURMAN: I'm really goping in the dark when I don't have the study before me. The kind of fees this witness is being paid, I'm sure he won't mind coming back and finishing his testimony.

THE WITNESS: It's plus expenses.

JUDGE BARNES: Well, that's not the issue here, Mr. Thurman. Why don't you proceed with cross examinating as far

as you can go.

Go ahead.

BY MR. THURMAN:

Q What was the scope of your consultancy agreement?

A Are you talking about this case now with this unidentified company?

Q Yes.

A They asked us to help them assess a potential acquisition of a U.S. company.

Q I believe the record states, I'm not sure, when was this agreement made?

A It was late February or early March, in that, in the spring of the year, if you will, of this year, '74.

Q Did they give you any reasons why they wanted to look into this possible acquisition?

A Some general reasons.

Q What were those reasons?

A One key reason was the investment climate in the United States was much better than the investment climate in some other markets, talking about taxes and things of that nature.

Q What type of market, investment climate in what market in the United States?

A I'm referring to the financial U.S. market, the ability to -- not to be taxed to death and this kind of thing.

Q What U.S. Market are we talking about?

A The U.S. economy I'm talking about. This is --

Q Yes, but what market were they interested in investing in?

A In their own product area, industrial gases.

Q Industrial gases.

JUDGE BARNES: Mr. Karnath, may I ask you a question.

Would the prices on the New York Stock Exchange, shall we say the market has been down for this past year, would that spur the interest of a foreign company in making an acquisition in this country at this time?

THE WITNESS: I think that's a good question, a good point, and a valid point. That certainly, with the devaluation of the dollar, coupled with some of the very low PE ratios, it doubles the interest in making acquisitions in the United States, investing in the United States.

BY MR. THURMAN:

Q Was shortage of supply of industrial gases, did that have any influence on their desire to enter?

A I would say it would be zero influence.

Q You would say. Was it discussed with you or not?

A They never suggested it as a reason they wanted to do it.

Q What was the PE of the acquiring company, the company they wanted to acquire in 1973?

THE WITNESS: This is a process of elimination of who the companies are.

MR. KAPLAN: Your Honor, at least could we have it in the same year we are talking about?

JUDGE BARNES: Yes. Let's make it in 1974. I don't think that would give away the acquiree necessarily. PE ratios change and there are so many companies.

MR. KAPLAN: While my original reaction was precisely what yours was, there are only six publicly traded industrial gas companies in the United States, something of that nature. And I suspect that the answer to that question would limit the field to no more than two.

JUDGE BARNES: All right. Mr. Thurman can withdraw that question or have it put in camera.

Are you withdrawing your earlier question, Mr. Thurman?

MR. THURMAN: Was I told to?

JUDGE BARNES: No, we can have him write it on a piece of paper and we'll put it in the record in camera, if you want.

MR. KAPLAN: Your Honor, if we can have a moment, we'll check the January 1 stock market listings and see if it would give it away.

MR. TOPKIS: I think it certainly would, your Honor, at quick glance.

MR. KAPLAN: Your Honor, there is no question that it would give it away.

JUDGE BARNES: All right.

MR. THURMAN: Your Honor, if you recall, Mr. Kaplan brought your attention to certain things in this study and then said in this study -- this study is in for the same purpose. There might be some things we want to bring to your Honor's attention in the new study that has been made.

I don't see how we can effectively cross examine without knowing what this study is in, how much stock they wanted to acquire, whether this is purely investment.

JUDGE BARNES: You can ask him those questions right now.

MR. THURMAN: I have no way of knowing whether --

JUDGE BARNES: He is telling the truth or not?

MR. THURMAN: Right. He is an adversary witness as far as I'm concerned, possibly a hostile witness.

I would think if I was getting paid to conduct this study and being paid the sum that is being paid to this man to testify, certainly he is going to be hostile to --

JUDGE BARNES: Mr. Kaplan has not offered into the record the conclusions reached, the recommendations made or anything of that nature. He has not offered that into the record.

MR. THURMAN: What he has offered into the record, I think he offred into the record, to show this company is conducting a study and therefore they are the most likely entrant into the United States. That's his sole purpose

for asking that, putting this company at the brink of the edge of the market.

I really don't know how to ask those questions without --

JUDGE BARNES: I'll tell you what you may do. You may subpoena that study for your rebuttal if you feel that itis necessary. You may call Mr. Karnath as your own witness in rebuttal if you feel that's necessary.

Your problem here now is cross examination. I feel that you can cross examine this witness without the study to the extent that Mr. Kaplan has offered evidence into the record.

MR. THURMAN: We were told that the only study that would be brought up is this Arthur D. Little study. So this is I guess trial by ambush again.

JUDGE BARNES: He has not offered any other study in evidence.

MR. THURMAN: He talked about a study. Anytime you talk about a study, the study should be there to be examined. Certainly you can't talk about a study on the witness stand unless opposing counsel can look at it. And that's what he asked him. It's certainly convenient to say, did you make a study, and say yes, and who, and write the name down and get it in the record. And then ask your Honor to say this study is made, so, therefore, would you infer that they were on the brink of the market, ready to jump in or plunge in.

MR. KAPLAN: Your Honor, I just might observe I am hard

put to see how Mr. Thurman has as much problem cross examining on this point as we did, golf game with an unidentified BOC employee sometime in the distant past.

MR. THURMAN: You can certainly ask him what he talked about in that. There certainly wasn't a study made there. There is no comparison. I'm surprised Mr. Kaplan would even suggest such a comparison.

JUDGE BARNES: You can ask him what kind of a study was commissioned, what his instructions were, an things of that nature. The study has not been offered in evidence. The conclusions of the study have not been offered in evidence.

MR. THURMAN: Your Honor, may we have a recess so I can decide what I want to do?

JUDGE BARNES: All right. I will give you ten minutes.

(Recess.)

JUDGE BARNES: On the record.

MR. THURMAN: Your Honor, Mr. Kaplan told Mr. Youngwood specifically that no other study would be mentioned in this case except that Arthur D. Little study -- U.S. Steel, well, Arthur D. Little is the U.S. Steel study.

This comes as a complete surprise, and certainly if we had been told -- just the fact that the study was commissioned, we would have gone to the party to find out from the horse's mouth why they were commissioning this study.

I assume a lot of companies commission Little to do

studies which they never follow up.

This study was after the BOC acquisition, and we would like to have it from them. Not from this witness. Why they figured maybe if BOC can get away with it, and if the violation of law is not found, they will try the same thing, or even before the outcome of this case, they may figure if BOC can do it, we can do it. And we don't want to find out from these people.

JUDGE BARNES: You have made a very fine argument as to why I should give little weight to this evidence. But you haven't told me why the evidence should be excluded or anything of that nature.

MR. THURMAN: Why the evidence should be excluded, if he said he made a study for somebody, we would have no objection to that. But from then on we'd move it be stricken, any reference to this study.

JUDGE BARNES: What else does he have in besides that, besides that?

MR. THURMAN: Well, the name of the company, who was going to acquire who, and the purpose, and some things we went into.

MR. KAPLAN: Mr. Thurman asked for the purpose.

MR. THURMAN: Well, Mr. Thurman feels now we probably shouldn't have cross examined at all. And I do not wish to continue cross examination. I'm not going to cross

examine the witness blindly. I'd like to know what I'm talking about and what is in the document, their consultancy agreement, and be able to talk to the company itself, and find out.

So I'm not going further on cross examination.

JUDGE BARNES: You will have an opportunity to present rebuttal in this case, Mr. Thurman. If you want to go to talk to either or both companies, you may do so.

MR. THURMAN: I would like to get a subpoena signed by your Honor to subpoena the underlying documents and the report and the consultancy agreement.

It's not typed. I don't know whether your Honor can sign it or not.

JUDGE BARNES: I will sign such a subpoena or I will consider such a subpoena for your rebuttal, if you wish to recall --

MR. THURMAN: I thought Mr. Karnath had these documents with him at this time we could subpoena it at this time.

JUDGE BARNES: Well, we don't have to use a subpoena. If he has them at this time and he doesn't mind producing them, he can hand them over to you.

BY MR. THURMAN:

Q Do you have --

A I don't have a piece of paper on me.

JUDGE BARNES: You can have from now until your rebuttal

to think about this, what you want to do on rebuttal.

Your problem now is to complete your cross-examination.

MR. THURMAN: And I feel that I cannot complete my cross-examination without that. I am being denied -- with all due respect, my feeling is I'm being denied the opportunity of proper cross examination due to the surprise, which is one element, and the lack of documents present is the second element.

JUDGE BARNES: All right. I will say one thing. The surprise elements seems to be valid.

I think he should have been told.

MR. KAPLAN: May I speak to that, your Honor?

JUDGE BARNES: Yes, Mr. Kaplan.

MR. KAPLAN: Firstly, I never said to Mr. Youngwood that the only study that would be mentioned in this case would be the Arthur D. Little study. For one thing, that would be obviously foolish in light of the Perham-Greenfield study.

But I did say to Mr. Youngwood that the only study we would offer in evidence through Mr. Karnath would be the U.S. Steel Study. We did give Mr. Youngwood a statement of issues on which this witness would testify. I believe it said Mr. Karnath would testify with respect to potential entrants into this market. Certainly that's all he did here today.

And finally, I might say, as far as I recall, the

statement that we gave to the government was verbatim, the statement we got from them.

JUDGE BARNES: It followed their pattern?

MR. KAPLAN: Yes.

And you may recall when Dr. Hedley White testified we had a written statement from the government he was going to testify on and these initia and he went on to a long testimony on inhalation therapy. I don't think the Government was surprised, and it wasn't the --

JUDGE BARNES: Yes. I think this is only one bit of evidence relating to this particular company. I think we have had evidence as to both companies in this proceeding.

And also, I would say that perhaps complainant counsel interprets your statement on the witness to mean he would only testify abou it, about U.S. Steel, not that that's the way they should have, but I think they probably did do that.

But in any event, I think you can cross examine this witness here today. And if you have no further questions, I'm going to dismiss him and leave you to your thoughts on rebuttal.

MR. KAPLAN: Your Honor, if I may, I should add one fact, and that is that I didn't know the identity of these companies until this morning.

JUDGE BARNES: Do you have any further --

MR. THURMAN: We didn't know until this afternoon.

JUDGE BARNES: Do you have any further questions, Mr. Thurman?

MR. THURMAN: No, your Honor. I belive my position is clear, though. We would have further questions if I had proper documents to cross.

JUDGE BARNES: Any other questions?

MR. KAPLAN: No, your Honor.

JUDGE BARNES: All right, thank you.

(Witness excused.)

MR. THURMAN: Did you deny my motion to sttike?

JUDGE BARNES: To strike what?

MR. THURMAN: I made a motion to strike all the testimony except the fact that he has commissioned by someone to conduct a study.

JUDGE BARNES: You mean you are making a motion to strike all the bestimony about thatparticular study exeept for the fact that he was commissioned to make a study?

MR. THURMAN: Yes, sir.

JUDGE BARNES: I believe that's about all that was said.

MR.THURMAN: No. Who the parties were, he said, that's a document in evidence. Striking the exhibit.

JUDGE BARNES: You move to strike the exhibit?

MR. THURMAN: Right.

JUDGE BARNES: I will deny your motion.

BEST COPY AVAILABLE

All right. Any other --

MR. TOPKIS: Your Honor, that concludes our witnesses for the day.

May we join your Honor in Washington on Monday to discuss the matter of the subpoena? Will that be convenient for you?

JUDGE BARNES: Yes. First let's complete our --

That will be an informal hearing?

MR. TOPKIS: Right.

JUDGE BARNES: And I assume we'll meet again Wednesday, at ten o'clock, in this room.

And could you give complainant counsel a schedule of the witnesses for next week.

MR. TOPKIS: Yes, your Honor.

We will have Messrs. -- they've already been given it, I think. But it is Messrs. Lienhard, Kridl, Nathan, Cosgrove, Lake and Lasiter.

And I might tell your Honor that it is quite possible that we'll be dropping one or two of these.

JUDGE BARNES: So you anticipate we will be able to finish all of these witnesses Wednesday, Thursday, and Friday?

MR. TOPKIS: I would expect so, your Honor, assuming some privity on cross.

JUDGE BARNES: Thereafer, what will be the rest of your case, your plans?

MR. WOLLEN: It is our present intention to call Mr. Dillon and that would be our only witness.

JUDGE BARNES: None for Airco?

MR. WOLLEN: No.

MR. TOPKIS: We haven't offered most of our documents. I think most of them are quite routine in nature.

Perhaps if complainant counsel could give us, could identify to us any that they have objection to, we could be prepared and perhaps discuss them before your Honor on Monday.

I realize we want to have an informal meeting on Monday. But some of the documents I would like to have received or considered, and either received or rejected, before one of our witnesses of next week takes the stand, because they will be the foundation in part of his testimony.

So if we could have that matter considered sometime Monday, it would help us.

JUDGE BARNES: I propose that you meet with me and complainant counsel at about eleven o'clock.

MR. TOPKIS: Fine.

JUDGE BARNES: I'll try to get a conference room over in my building.

MR. TOPKIS: Fine.

JUDGE BARNES: Otherwise, we'll be back here on Wednesday at ten o'clock.

(Adjourned to July 12, 1974 at 10:00 a.m.)